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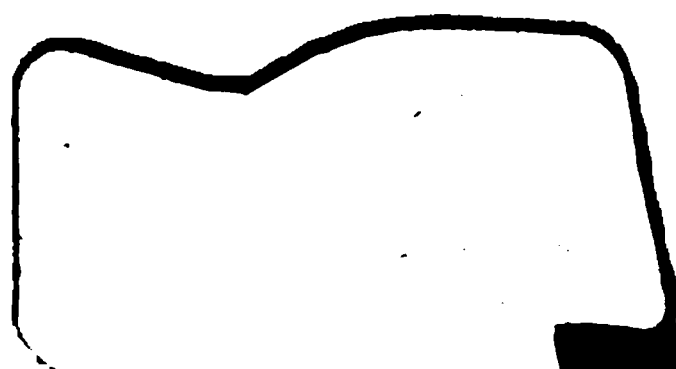
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**A TREATISE ·**  
**ON THE**  
**LIMITATIONS OF ACTIONS AT LAW**  
**AND**  
**SUITS IN EQUITY AND ADMIRALTY;**  
**WITH**  
**AN APPENDIX**  
**CONTAINING**  
**THE AMERICAN AND ENGLISH STATUTES OF LIMITATIONS.**

**By J. K. ANGELL.**

**SIXTH EDITION,**  
**REVISED AND GREATLY ENLARGED.**

**BY**  
**JOHN WILDER MAY,**  
**AUTHOR OF "TREATISE ON THE LAW OF INSURANCE."**

**BOSTON:**  
**LITTLE, BROWN, AND COMPANY.**

**1876.**



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TO THE

HON. JOHN BROWN FRANCIS,

LATE GOVERNOR OF THE STATE OF RHODE ISLAND, AND LATE SENATOR IN THE  
CONGRESS OF THE UNITED STATES FROM THAT STATE,

THE FOLLOWING TREATISE

IS INSCRIBED

IN TOKEN OF THE HIGH RESPECT AND UNAFFECTED FRIENDSHIP OF

THE AUTHOR.





## PREFACE TO THE SIXTH EDITION.

---

IN the preparation of this edition the Editor has pursued the same plan as heretofore. He has deemed it, however, inexpedient unnecessarily, and without any corresponding advantage, to swell the volume by the addition of many cases, especially from the older States, which are merely in recognition of previously decided cases. For the same reason he has not added to the Appendix the statutes of those States upon which no adjudications have come to hand. Nevertheless, about two hundred additional cases, decided since the publication of the fifth edition, have been cited in their appropriate places, and the work will be found, as heretofore, a pretty nearly complete repertory of what is to be found in the books, of value, upon the Law of Limitations.

J. W. M.

APRIL, 1876.





## PREFACE TO THE THIRD EDITION.

---

FOR this new and third edition of the following work, the author, as the title-page imports, has been indebted to the learning and labor of J. W. MAY, Esq., of the Boston Bar; and the author cannot too strongly express satisfaction with the successful manner in which that gentleman has discharged the onerous duty he was persuaded to assume, of preparing for the press this new edition. An entire confidence is entertained that those of the profession who have occasion and are prompted to consult the work will cordially acknowledge their obligation to him.

The author, in this Preface, takes the liberty to state how much has been done by Mr. MAY. The number of cases in the last edition is *seventeen hundred* precisely; and the number in the new edition will vary very little, if at all, from *twenty-four hundred and six*, making an addition of *seven hundred and six*, or, in round terms, of over seven hundred cases. Some of these additional cases are, of course, cases in which no new point is decided; but, as the book is intended for general use, it was thought it might be acceptable to the profession to have all the cases, in all the courts, so far as they have been reported, as very few of the profession have access to all the Reports, while every one has access to some. Where no new point has been

decided, the case is merely cited, as reported, in its appropriate place. In all instances where a new point has been decided, or one heretofore supposed to have been settled has been overruled, or important dicta or suggestions have been made, a note thereof has been carefully prepared. The notes added and included in brackets amount to about seventy pages, and if printed in the text would make an enlargement of the work of about one hundred and forty pages ; so that, in fact, the book has, by Mr. MAY's labors, been enlarged about one-third.

The Statutes of Limitation of the States of Florida, Iowa, Texas, and California have also been added to the Appendix, and the Index has been so altered as to make it conform to the new and improved arrangement by sections.

PROVIDENCE, Nov. 1, 1864.

## PREFACE TO THE SECOND EDITION.

---

So sensible is every lawyer of the importance of the law relating to the Limitations of Actions and Suits, of the frequent occurrence, at the present day, of occasion to investigate it, and of the want of any late general work on the subject, that it is only necessary, it is presumed, to advert to these facts for an apology for submitting such a work to the public. In preparing the following, the design of the author has been both to afford instruction to the student, and subserve the convenience of the practitioner. Although it is entitled "a second edition," it is in all respects a *new*, as well as much enlarged work. The adoption of a different method in treating of the subject, the author hopes, and is induced to believe, will be deemed an improvement, by those who may have recourse to the present, and have had an acquaintance with the past, editions. What is of more importance, the present Treatise is in a very great measure a fresh production as relates to the matter, it having been much extended by new references to, and illustrations of, the law as accumulated by latter adjudged cases.

The Appendix is valuable as containing the results of later and more enlightened and suitable legislative action. It embraces late Revised Acts of Limitations of the old States, and Acts on the same subject promulgated by new

States; the late English Act of 3 & 4 Will. IV. c. 27; the Act of 9 Geo. IV. requiring all acknowledgments of debts and new promises to be in writing; and Acts, with like provisions, of some of our States. These Acts are referred to from time to time in the course of the Treatise, as occasion renders proper; and so, also, have decisions under them in like manner received attention.

The above-mentioned Act of 3 & 4 Will. IV. is entitled, "An Act for the Limitations of Actions relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," and was intended to be adapted to the modern state of society. To this end, it has effected a no less desirable, than radical, change in the law of Real Actions, by their almost entire abolition; and a change in the law of possession, by rendering it, in positive terms, the means of the extinguishment of title, at the end of the period of limitation. The old statutes of limitations do not, in terms, apply to Courts of Equity, though equitable titles have uniformly been held to be affected in analogy to those statutes. But the provisions of this Act have the effect of making imperative on Courts of Equity what they had before done at discretion. The provisions, many of them, are very special, and by some have been thought difficult of construction.<sup>1</sup> In reference to the Act in general, it has been justly remarked by a very learned English writer,<sup>2</sup> "that it is seldom possible to understand a law which repeals a former, and substitutes new provisions, unless we have a competent knowledge of the law repealed." This competent knowledge it has been the aim of the author

<sup>1</sup> Smythe's Landlord and Tenant in Ireland.

<sup>2</sup> 1 Sugden, Vend. & Pur. 398.



of the following work to afford, by giving the statutes of 32 Henry VIII. and of 21 James I. in the Appendix, and by reference to their settled judicial construction, in the Treatise. Besides which, the Act in question is followed in the Appendix by an analysis of it, accompanied by comments and references to a considerable number of cases explanatory of its text; and for this the author has been indebted to an English publication of merit, entitled, "Browne on Actions at Law."

The following work is, in like manner, as it were, an introduction to such changes as will be found made by the Revised Statutes of Limitations of some of our States.

PROVIDENCE, April 16, 1846.



# CONTENTS.

---

	PAGE
INDEX TO CASES CITED . . . . .	xix

## CHAPTER I.

PREScription . . . . .	1
------------------------	---

## CHAPTER II.

LIMITATION OF ACTIONS AT LAW . . . . .	9
--	---

## CHAPTER III.

LIMITATION OF SUITS IN EQUITY . . . . .	21
---	----

## CHAPTER IV.

LIMITATION OF SUITS IN ADMIRALTY . . . . .	27
--	----

## CHAPTER V.

CLAIMS IN FAVOR OF THE STATE AND OF THE UNITED STATES. . . . .	30
--	----

## CHAPTER VI.

OF THE COMPUTATION OF TIME . . . . .	37
--------------------------------------	----

## CHAPTER VII.

WANT OF PERSONS TO SUE AND BE SUED . . . . .	49
--	----

## CHAPTER VIII.

LEX LOCI ET LEX FORI . . . . .	56
--------------------------------	----

## CHAPTER IX.

WHAT ACTIONS AND DEMANDS EX CONTRACTU MAY BE BARRED	68
---	----

## CHAPTER X.

SPECIALTIES . . . . .	79
-----------------------	----

## CHAPTER XI.

PROMISSORY NOTES AND BILLS OF EXCHANGE . . . . .	93
--	----

## CHAPTER XII.

MISCELLANEOUS SIMPLE CONTRACTS . . . . .	103
--	-----

## CHAPTER XIII.

TORTS QUASI EX CONTRACTU . . . . .	123
------------------------------------	-----

## CHAPTER XIV.

MUTUAL ACCOUNTS . . . . .	135
---------------------------	-----

## CHAPTER XV.

MERCHANTS' ACCOUNTS . . . . .	148
-------------------------------	-----

## CHAPTER XVI.

TRUSTEES OF PERSONAL PROPERTY GENERALLY . . . . .	161
---	-----

## CHAPTER XVII.

AGENCY AND FACTORAGE . . . . .	177
--------------------------------	-----

## CHAPTER XVIII.

REPLICATION OF FRAUD . . . . .	186
--------------------------------	-----

## CHAPTER XIX.

EXCEPTION OF PERSONS UNDER DISABILITIES . . . . .	201
---	-----

## CHAPTER XX.

NEW PROMISES AND ACKNOWLEDGMENTS . . . . .	218
--	-----

## CHAPTER XXI.

CONDITIONAL AND INDEFINITE ACKNOWLEDGMENTS . . . . .	246
--	-----

CHAPTER XXII.

ACKNOWLEDGMENT BY PART PAYMENT . . . . . 257

CHAPTER XXIII.

ACKNOWLEDGMENT BY ONE OF SEVERAL CO-CONTRACTORS . . . 269

CHAPTER XXIV.

ACKNOWLEDGMENTS BY AND TO AGENTS, EXECUTORS, ETC. . . 288

CHAPTER XXV.

ACKNOWLEDGMENTS IN WRITING . . . . . 298

CHAPTER XXVI.

PLEADING THE STATUTE IN ACTIONS EX CONTRACTU, AT LAW,  
AND IN EQUITY . . . . . 310

CHAPTER XXVII.

TORTS . . . . . 320

CHAPTER XXVIII.

JUDICIAL PROCESS . . . . . 330

CHAPTER XXIX.

OF REAL PROPERTY AND THE LIMITATION OF REAL ACTIONS . 348

CHAPTER XXX.

OF THE ACTION OF EJECTMENT AND THE RIGHT OF ENTRY. . 372

CHAPTER XXXI.

ADVERSE POSSESSION . . . . . 384

CHAPTER XXXII.

COTENANCY . . . . . 438

CHAPTER XXXIII.

LANDLORD AND TENANT . . . . . 451

CHAPTER XXXIV.

MORTGAGOR AND MORTGAGEE . . . . . 461

CHAPTER XXXV.

TRUSTEE AND CESTUI QUE TRUST . . . . . 478

CHAPTER XXXVI.

DISABILITIES IN RESPECT TO REAL PROPERTY . . . . . 487

CHAPTER XXXVII.

OF JUDICIAL EXCEPTIONS, ETC. . . . . 498

APPENDIX.

LIMITATION OF ACTIONS.

BY THE STATUTE 32 HEN. VIII. (CH. 2) . . . . . i  
" " " 21 JAMES I. (CH. 16) . . . . . iii  
" " " 14 WILL. IV. (CH. 27) . . . . . vi  
COMMENTS, ETC., ON THE ABOVE STATUTE . . . . . xvii

IN THE UNITED STATES.

NEW ENGLAND STATES.

MAINE . . . . . xxxiv  
VERMONT . . . . . xli  
NEW HAMPSHIRE . . . . . xlvi  
MASSACHUSETTS . . . . . xlix  
CONNECTICUT . . . . . lv  
RHODE ISLAND . . . . . lviii

MIDDLE STATES.

NEW YORK . . . . .	lx
NEW JERSEY . . . . .	lxix
PENNSYLVANIA . . . . .	lxxv
DELAWARE . . . . .	lxxx
MARYLAND . . . . .	lxxxiii

SOUTHERN STATES.

VIRGINIA . . . . .	lxxxiv
NORTH CAROLINA . . . . .	lxxxix
SOUTH CAROLINA . . . . .	xcv
GEORGIA . . . . .	cii
ALABAMA . . . . .	cvi
MISSISSIPPI . . . . .	cx
LOUISIANA . . . . .	cxvi
ARKANSAS . . . . .	clxvii
FLORIDA . . . . .	cliii
TEXAS . . . . .	clvi

WESTERN STATES.

TENNESSEE . . . . .	cxviii
KENTUCKY . . . . .	cxxii
OHIO . . . . .	cxxiv
INDIANA . . . . .	cxxviii
ILLINOIS . . . . .	cxxx
MICHIGAN . . . . .	cxxxi
WISCONSIN . . . . .	cxxxvii
MISSOURI . . . . .	cxliii
IOWA . . . . .	clxiii
CALIFORNIA . . . . .	clxiv
OREGON . . . . .	clxix
MINNESOTA . . . . .	clxxiii
KANSAS . . . . .	clxxvi

NEVADA . . . . . clxxxi  
NEBRASKA . . . . . clxxxvi

LORD TENTERDEN'S ACT.

9 GEO. IV. CH. 14, REQUIRING ACKNOWLEDGMENTS OF DEBTS  
TO BE IN WRITING . . . . . clxxviii  
SIMILAR ACT OF VIRGINIA . . . . . clxxx

---

INDEX . . . . . 691



## INDEX TO CASES CITED.

A.		SECTION		SECTION
Abell v. Harris		390, 409	Altemus v. Campbell	377
Abbott v. McElroy		56, 63	v. Trimble	402
A'Court v. Cross	11, 211, 220		Ament v. Wolf	402
Adams v. Seitzinger		242	American Bank v. Baker	236
v. Clarke		134	Amistead v. Brooks	247
v. Fort Plain B'k		120	Anderson v. Burwell	172
v. Palmer		79	Adm'r v. Smith	197
v. Torrey		231	v. Sanderson	261
Adamson v. Smith		477	Andrew v. Allen	69
Adm'rs of McDowell v. Ex'rs of			v. Ridgley	470
Grodmyn		115	Andrews v. Mulford	394, 413
Agee v. Williams		317	v. Heriot	66
Agnew v. Fetterman		232	v. Brown	209
Aiken v. Appleby		50	v. Southwick	174, 186
Alcock v. Ewan		224	Anon.	200, 394
Alden v. Gilmore		391	App v. Driesbach	145, 176, 178, 433
Aldrich v. Morse		240	Appleby v. Obert	406
Alexander v. Pendleton		414	Arden v. Arden	168
v. Williams		167	Areaux v. Mayeux	240
v. Leckey		70	Arey v. Stephenson	238
v. Macauley		142	Argall v. Bryant	136
v. McMurry		468	Armistead v. Brook	247
Alison v. James		213	Armstrong v. Campbell	468
Allen <i>ex parte</i>		167	v. Dalton	38
v. Blakeway		375	v. Risteau	381, 395
v. Hall		429	Arnold v. Downing	240
v. Holton		413	v. United States	42, 45
v. Mille		185	Arnott v. Holden	140
v. Mann		313	Ashbrook v. Quarles' Heirs	22, 197
v. Ormond		300	Ashby v. James	146, 148
v. Webster	214, 260		Ashley v. Hill	145, 150
v. Portland Stage Co.		315	Atherton v. Johnson	390
v. Sawtelle		328	Atkins v. Sarborough	142
Allen, Adm'rs v. Wooley		167	Atkyns v. Tredgold	248, 260, 264
Allender v. Vestry, &c.		233	v. Horde	15, 341, 370, 387, 409, 426, 443
Allis v. Moore		478	Attorney General v. Stewart	338
Allison v. Pennington		148	v. Federal St. Church	468
v. Nash		84	Atwood v. R. I. Agr. Bank	80
Alston v. State Bank		241	v. Colburn	218
v. Collins		401	Aubrey v. Fortescue	488
v. Alston		178		

Austin v. Moore	140	Bank of Hartford v. Waterman	142
v. Bostwick	217, 258	Newbern v. Snead	223
Ayer v. Hawkins	240, 244	Memphis v. White	95
Ayers v. Richards	231	Orange Co. v. Knight	319
Aylett v. Robinson	239	Poughkeepsie v. Ibbot-	
Ayletts' Ex'rs v. Robinson	220, 235	son	249
Ayraud v. Babin	54	S. C. v. Knott	130
Ayres v. Henderson	206	the State v. Smyers	401, 405
Ayton v. Bolt	211, 236	Tenn. v. Hill	187, 247
		Utica v. Childs	138
		U. S. v. Daniels	24, 26, 116
		v. Donally	66
		v. Lyle	316
		v. McKenzie	41, 202
		Bannegan v. Murphy	82
		Bannon v. Brandon	442
		Barclay v. Gouch	134
		v. Howell	398
		Barger v. Durwin	233, 261
		Barino v. McGee	197, 327
		Barker v. Green	142
		v. Millard	327
		v. Richardson	415
		v. Salmon	404
		Barley v. Ashton	272
		Barlow v. Bellamy	219
		Barnard v. Bartholomew	215, 239
		v. Edwards	367
		Barney v. Sutton	394, 411
		Barnet v. Ihrie	333
		Barnsback v. Reiner	131
		Barr v. Gratz	386, 392, 410
		Barrett v. Barrett	288
		Baretto v. Snowden	269
		Barron v. Martin	459
		v. Kennedy	240
		Barrow v. Shields	196
		Bartholomew v. Edwards	390
		Barto v. Abbe	50
		Barton v. Dickens	305
		Bartlett v. Simons	391
		Bash v. Bash	115
		Baskins v. Wilson	322
		Bass v. Bass	145, 150, 157, 162
		v. Williams	78
		Bateman v. Pindar	240
		Bates v. Norcross	408
		Bathgate v. Hoskin	120
		Batterton v. Chiles	384
		Battles v. Forbes	22
		Battley v. Faulkner	136, 137, 142
		Baucum v. Streater	117
		Baxter v. Guy	118
		v. Penniman	265, 288
		Bayard v. McInnes	394
		Beach v. Catlin	471
		Beadle v. Hunter	304
		Beal v. Nason	22
		v. Nind	238
B.			
Babcock v. Wyman	449		
Backhouse v. Bonomi	186		
Bacon v. McIntire	454		
Badger v. Phinney	312		
v. Arch	247		
Badlam v. Tucker	304		
Bagler v. Dejunette	169		
Bagley v. Wallace	37		
Baille v. Sibbald	211		
Bailey v. Jackson	87, 477		
v. Bailey	213, 266		
v. Carlton	390		
v. Crane	215, 238, 241		
v. Doolittle	404		
v. Hall	298		
v. Irley	391		
Baines v. Williams	136		
Baird v. Walker	181		
Baker v. Atlas Bank	142		
v. Baker	25, 325		
v. Biddle	26		
v. Brown	84		
v. Chase	304		
v. Evans	449, 454		
v. Grundy	484		
v. Jackson	22		
v. Joseph	115		
v. Mitchell	148		
v. Stackpole	260		
v. Van Valkenburgh	477		
v. Whiting	166, 174, 418, 435, 472		
Balch v. Onion	233, 240		
Balcom v. Richards	260		
Baldro v. Tolmie	22		
Baldwin v. Calkins	301		
Ball v. Towson	178		
Balls v. Westford	437		
Baltimore & Penn. Co. v. Barnes	110		
Bancroft v. Andrews	25		
Bangs v. Hall	215, 236		
Bank v. Byrd	196		
v. Sullivan	218		
Bank of Alabama v. Dutton	22		
Alexandria v. Dyer	200, 203		
Augusta v. Earle	66		

Beanes v. Hamilton	82	Bishop v. Little	118, 186, 189
Beardsley v. Southmayd	66, 67, 194, 204	Bissell v. Hall	84
Beasley v. Greenslade	240	Black v. Winnisheik Ins. Co.	187
Beatty v. Burnes	23, 70	Black's Ex'r v. Reybold	222
v. Clement	241	Blackburn v. Morton	67
Beaupland v. McKeen	402	Blackford v. Peltier	22
Beckford v. Wade	5, 25, 67, 178, 194, 469, 479, 485	Blain v. Blain	313
Beck v. Beck	231	Blair v. Bromley	142
v. Searson	186	v. Drew	145, 218
Beekman v. Satterlee	312, 318	v. Smith	404
Beesley v. Spencer	22	Blaisdell v. Martin	385
Beitz v. Fuller	248	Blake v. Crowninshield	53
Belknap v. Gleason	73, 217	v. Foster	464
Belote v. Wynne	226, 259	Bland v. Hasselrig	209, 248, 287
Bell v. Crawford	231	Bledsoe v. Doe	37
v. Adm'rs of Rowland	225	Blight's Lessee v. Rochester	386, 404, 444, 471
v. Hartley	390, 401	Blood v. Wood	391
v. Lamprey	200	Bloodgood v. Bruen	232, 233, 269
v. Longworth	395, 404	Blount v. Robeson	167, 404
v. McCawley	375	Blue Hill Academy v. Ellis	231
v. McCall	213	Blunt v. Heslop	48
v. Morrison	23, 145, 209, 218, 239, 259, 263	Bodell v. Janney	23, 194
v. Yates	95	Bogardus v. Trinity Church	401, 430
Bellasis v. Hester	44, 49	Bogert v. Vermilya	204, 260
Beltzhoover v. Yewell	22, 145, 221, 244	Bohannon v. Chapman	304
Bennington v. Dinsmore	324	Bolivar Manuf. Co. v. Neponset Manuf. Co.	300
v. Parkhurst	377	Bolling v. Petersburg	346, 390
Benjamin v. De Groot	200	Bolton, <i>ex parte</i>	184
Bennet v. Cook	131	v. Hamilton	432
Bennett v. Davis	145	Bond v. Lathrop	260
v. Williamson	477	v. Hopkins	25, 30, 377, 473
Benson v. Stewart	449	Bonney v. Redgard	470
Benyon v. Evelyn	23	Boody v. Lunt	107
Berghaus v. Calhoun	213	Booker v. Gregory	109
Berrien v. Wright	206	Boone v. Chiles	26, 174, 471
Berrion v. Conover	367	Borden v. Pray	247, 260
Berry v. Pierson	182	Bordwell v. Clayton	367
Betts v. Norris	142	Boston Mill Dam Corporation v. Bullfinch	391
Bevan v. Gelthing	271	Bosworth v. Smith	56
Beverly's Case	197	Bowers v. Johnson	261
Bevil's Case	390	Bowie v. Drake	401
Bibb v. Peyton	260	Bowker v. Harris	219
Biddle v. Moore	285	Bowles v. Elmore	115
Bidwell v. Rogers	235	v. Woodson	117
Bigelow v. Ames	66	Bowley v. Walker	381
v. Wilson	50	Bowman v. Bartlett	401
Billings v. Hall	2	v. Sanborn	186
Bilton v. Johnson	315	v. Wathen	25, 26, 382, 468
Birch v. Wright	448	Boxley v. Gayle	231
Bird v. Adams	269	Boyd v. Barrenger	22, 84
v. Gammon	238	v. Beck	449
v. Harose	285	v. Graves	428
Biscoe v. James	260	Boydell v. Drummond	234
v. Jenkins	260	Brackett v. Mountfort	216
Bishop v. Lee	392	v. Norcross	431
		Bracken v. Martin	390

Brackenbridge v. Bottzell	150	Brockenbrough v. Huckley	258
Bradbury v. Grinsell	415	Broddie v. Johnson	226
Bradfield v. Tupper	240	Bronson v. Adams	484
Bradford v. Andrews	317	v. Fitzhugh	249
v. Edwards	317	Brooks v. Clay	401
v. Spyker 27, 149, 161,	233	v. Towle	419
v. Strine	22	Brookshank v. Smith	296
Bradley v. Briggs	231	Brotherton v. Wood	299
v. Field	214	Brower v. Fisher	197
Bradshaw v. Cogan	211	Brown v. Agnew	126, 156
Bradstreet v. Clarke	345	v. Anderson	170, 288
v. Huntington	23	v. Bridges	213, 233
v. Huntingdon 369, 380,		v. Brown	67
390, 404, 418, 437		v. Byrd	82
Brady v. Calhoun	145	v. Campbell	213
Bragg v. Fletcher	107	v. Cockerell	384
Braildon v. Walton	240	v. Cousens	192
Brailsford v. James	238	v. Crawford	197
Brainard v. Stewart	79	v. Cullen	160
Braithwaite v. Britain	255	v. Delafield	204
Brandrum v. Wharton 240, 248, 253,		v. Edes	187
260		v. Edson	397
Brandter v. Marshall	442	v. Gay	390
Brandt v. Livermore	446	v. Gibbens	301
v. Ogden	390	v. Goolsby	317
Brashear v. Hewitt	404	v. Griffith	232
Braxton v. Wood	232	v. Hancock	285
Bree v. Holbrook 116, 184, 186		v. Hiatts	196
Breckenridge v. Baltzell	160	v. Hill	170
v. Churchill	109	v. Houdlette	88, 140
Bremion v. Evelyn	314	v. Howard 136, 137, 142, 184,	
Brennan v. Egan	293	304	
Brent v. Cook	101	v. Hutchins	241
v. Chapman	67	v. Jarvis	142
v. Tasker	200	v. Jones	32
Brewer v. Harris	51	v. King	405
Brewster v. Hardeman	247, 259	(Matter of)	21
Brian v. Tims	84, 204	v. McCoy	433
Brickett v. Davis	285, 303	v. McKinney	378, 390
Bridge v. Gray	260	v. Merrick	196
Bridges v. Mitchell	154	v. Parker	66, 84
Bridleman v. Foulke	301	v. Porter	377, 390
Brien v. Sargent	404	v. Putney	325
Brig Sarah	33	v. Rollins	200
Briggs v. Wilson 241, 265, 285		v. State Bank	231
v. Thomas	55	v. Stewart	62
Brigham v. Bigelow	207	v. Tyler	135
v. Hutchins	233	v. Wilcox	22
Brigstock v. Smith	211	Browne v. Cross	190
Brill v. Neele	76	Browning v. Paris	487
Brimfield v. Carter	37	Bruce v. Flagg	204
Brimmer v. Proprietors	410	v. Tillson	77
Briscoe v. Anketell 22, 247		v. Wood	371
v. Prewett	382	Bruen v. Bokee	82
British Linen Co. v. Drummond	66,	v. Hone	26
67, 83		Bryan v. Horseman	209, 210, 211
Britton v. Lewis	171	v. Ware	231
Broadhurst v. Balgammy	174	v. Weems	304
Brobst v. Bright	82	Bryant v. Allen	394

## xxiii

Bryant v. Tucker		387	Butterfield v. Jacobs		236
Buchan v. James	170, 175,	178	Butts v. Patton		82
Buchanan v. Parker		179	v. Perkins		247
Buck v. Spofford		127	Bynum v. Carter		410
Buckholder v. Sigler		396	v. Thompson		400
Buckingham v. Smith		238	Byrd v. Byrd		196
Buckinghamshire v. Drury		194	Byrne v. Crowninshield	200,	206
Buckler v. Moore		287	v. Lowry		413
Bucklin v. Bucklin		197			
v. Ford	55,	194	C.		
Buckmaster v. Russell		211	Cady v. Huntington		142
Bucknam v. Thompson		200	v. Shepard		258
Buckner v. Adm'r of Wheaton		228	Cain v. Furlough		432
v. Calcote		187	Calder v. Bull		22
Bulger v. Roche	64, 66, 67, 204,	206	Caldwell v. Harding		324
Bull v. Towsen		150	v. Rodman		95
Bullard v. Bell		80	v. Thorp		197
Bullen v. Arnold		413	Calhoun v. Cook		384
Bullock v. Campbell	100,	126	Calkins v. Calkins		22
v. Deane		313	Call v. Haggart		22
v. Lloyd		128	v. Neely		397
v. Smith		236	Callaway v. Nolley		22
Bunce v. Wolcott		479	Callender v. Colegrove		187
Buntin v. Lagow		145	v. Sherman	4,	404
Burd v. McGregor		82	Callis v. Tolson		304
Burdick v. Green		312	v. Waddy		185
Burger v. Darwin		260	Calvert v. Lowell		22
Burham v. James		167	Cambridge v. Hobart		256
Burk v. Howard		261	Cameron v. Irwin		418
Burke v. Jones		232	Camp v. Camp		444
v. Savage		381	v. Gullett		74
Burleigh v. Stott	248, 263, 275,	277	Campbell v. Boggs		181
Burlew v. Bellamy		219	v. Calhoun		124
Burn v. Bolton		244	v. Campbell		432
Burnham v. Brown		110	v. Stein		66
Burnitz, Lessee v. Casey		420	v. Vining		186
Burns v. Ray		304	v. White	200,	206
v. Swift	394, 402,	410	Cannon v. Rimington		359
Burr v. Burr		244	Caperton v. Gregory		421
v. Williams		260	Caplinger v. Vaden		117
Burrell v. Burrell	384,	393	Carlisle v. Morris		261
Burroughs v. Bloomer		206	v. Stitler		477
Burt v. Palmer		261	Carlton v. Ludlow		247
Burton v. Lockert		115	Carne v. Malins		325
v. Rutherford		131	Carpenter v. Butterfield		312
v. Stevens		247	v. Schermerhorn		484
Bush v. Barnard		236	v. Wells		67
v. Bradlee		479	Carr v. Hilton		183
v. Stowell	110,	260	Carrington v. Manning	169,	232
v. Van Kleek		22	Carroll v. Warring		89
Buskins v. Wilson		269	Carroway v. Cox		131
Butcher v. Hixton	220, 235,	241	Carshore v. Huyck	82, 235,	247,
Butler v. Howe	197,	198			269
v. Phelps		421	Carter v. Adamson		128
v. Price		241	v. Bennett		167
v. Wright		132	v. Cantrell		199
Butter v. Winters		226	Cartmill v. Hopkins		79
Butterfield v. Forester		142			

Caruth v. Page	231	City of Lexington v. Butler	95
Caruthers v. Dunning	420	Claggett v. Conlee	385
Cary v. Stephenson	55	Clapp v. Bromaghan	429
v. Whitney	37	v. Ingersoll	241
Case v. Cushman	247	Clay v. Clay	84
Castle v. Burditt	44, 46, 47, 48, 49	v. White	394
Caston v. Caston	367	Clayton v. Winchelsea	296
Catlin v. Kidder	429	Clayton's Case	49
v. Skoulding	144, 145, 146, 154	Clark v. Chase	414
Catteris v. Cowper	380	v. Gilbert	392, 407
Cawley v. Farwell	211	v. Hopkins	88
Cawthorne v. Weisinger	56	v. Hougham	184, 292
Chace v. Trafford	274	v. Iowa City	95
Chadwick v. Broadwood	445	v. Jenkins	151
Chalfin v. Malone	369, 384	v. Jones	197
Challefoux v. Ducharme	429	v. Mariott	304
Chamberlin v. Cugler	145, 147, 149	v. McGuire	149, 266
Chambers v. Chambers	285	v. Moody	180, 181
v. Garland	231	v. Reeder	304
v. Marks	145	v. Sigourney	260
v. Pleak	433	v. Smith	142
Champion v. Rigby	190	v. Tabor	393
Chancellor v. Wiggins	117	v. Trail	192
Chandler v. Chandler	22	Clarke v. Alexander	272
v. Cook	371	v. Bank of Miss.	22, 200
v. Lawrence	241	v. Courtney	384
v. Spear	403	v. Dutcher	116, 214, 238
v. Vilette	70, 195, 204	v. Figes	91, 92
Changeur v. Gravier	113	v. Hooper	246
Channell v. Ditchburn	248, 277	v. Slaughter	304
Chapin v. Coleman	297	Cleave v. Jones	240
Chaplin v. Wilkinson	135	Clemens v. Bennett	386
Chapman v. Butler	25, 189	v. Wilkinson	22
v. Templeton	396	Clementson v. Williams	11, 212, 248
Charlestown Bridge v. Warren		Cleveland v. Reed	25
Bridge	22	Cleveland Ins. Co. v. Head	413
Chauncey v. Rutter	315	Clifton v. Hooper	142
Cheetham v. Lewis	312	Cline's Heirs v. Catron	401
Cheney v. Ringold	401, 410	Clinton R. R. Co. v. Eason	115
Chenot v. Lefevre	206	Cloud v. Webb	433
Cheseldine v. Brewer	370	Cluggage v. Duncan	395
Chesly v. Dalby	239	Clymer's Lessee v. Dawkins	430
Chevely v. Bond	70	Coady v. Reins	22
Chickering v. Failes	404	Coalter v. Coalter	164
Chiles v. Calk	381	Cocke v. Dodson	412
v. Conley	401	Cockfield v. Hudson	304
v. Jones	402	Cockill v. Sparkes	211
Cholmondeley v. Clinton	25, 26, 166, 174, 382, 389, 437, 448, 457, 467	Cockran v. Welby	79, 142
Chomqua v. Mason	204	Cockrill v. Hobson	113
Choquette v. Barada	413	Cocks v. Weeks	231, 236
Christmas v. Mitchell	330	Codman v. Rogers	42, 87, 92, 96, 164
Christophers v. Sparke	453	v. Winslow	385
Christy v. Alford	413	Coffee v. Wilkinson	304
v. Flemington	233	Coffin v. Bucknam	216, 242
Church v. Feterow	213	v. Cottle	324
Cincinnati v. White	380	Cogswell v. Dolliver	144
City of Alton v. Illinois Tr. Co.	38	Coit v. Tracy	260
City of Cincinnati v. Evans	41	Colburn v. Hollis	390, 395, 409
		Colby v. Everett	73

<b>Colclough v. Hulse</b>	371	<b>Copse v. Eddins</b>	115
<b>Cole v. Irving</b>	416, 421	<b>Corbett v. Barker</b>	465
<i>v. Jussup</i>	206	<b>Corbyn dem. Bramston</b>	417
<i>v. McGlathry</i>	186, 187	<b>Cornelias v. Giberson</b>	396, 404, 413
<i>v. Saxby</i>	89	<b>Cornell v. Lambs</b>	338
<b>Coleman v. Davis</b>	174	<i>v. Moulton</i>	50, 53
<i>v. Fobes</i>	260	<b>Cornforth v. Smithard</b>	211
<i>v. Hutchinson</i>	70	<b>Corning v. McCullough</b>	70
<i>v. Walker</i>	473	<i>v. Troy Co.</i>	392
<b>Coles v. Kelsey</b>	247, 285	<b>Cornwell v. Morris</b>	62
<b>Colgate v. Buckingham</b>	95	<b>Cortelyou v. Lansing</b>	173
<b>Colledge v. Horn</b>	261	<b>Cosfrey v. Brown</b>	394
<b>Collett v. Frazer</b>	269	<b>Coster v. Murray</b>	145, 149, 154, 156,
<b>Collinge v. Haywood</b>	128		167, 183
<b>Collins v. Benning</b>	179	<b>Cotes v. Harris</b>	148, 160
<i>v. Goodall</i>	87	<b>Cottam v. Partridge</b>	69, 149, 153,
<b>Collinson v. Margesson</b>	211		160, 274
<b>Collis v. Stack</b>	211	<b>Cotterell v. Dutton</b>	482
<b>Collister v. Hailey</b>	196, 200	<b>Couch v. Couch</b>	183
<b>Collyer v. Wilcox</b>	246	<i>v. McKee</i>	22
<b>Coltman v. Marsh</b>	211	<b>Coulton v. Waters</b>	26
<b>Colvin v. Buckle</b>	128, 130	<b>Council v. Moyamensing</b>	73
<b>Comegys v. Carley</b>	384	<b>County of Lancaster v. Brenthold</b>	41
<b>Commissioners v. Andrews</b>	79	<b>Cowan v. Maguaran</b>	213
<b>Commonwealth v. Cochituate Bank</b>	95	<b>Cowart v. Perrine</b>	196, 247
<i>v. Frost</i>	109	<b>Cowper v. Goodwin</b>	117
<i>v. Hutchinson</i>	37	<b>Cox v. Bailey</b>	260
<i>v. Johnson</i>	37	<i>v. Brown</i>	
<i>v. Millenberger</i>	37	<i>v. Cox</i>	185
<i>v. Studley</i>	410	<i>v. Davis</i>	22
<b>Commonwealth Ins. Co. v. Whitney</b>	107	<b>Crabtree v. McDaniel</b>	304
<b>Compton v. Chandless</b>	304	<b>Craig v. Callaway</b>	247
<b>Con v. Penn</b>	406	<i>v. Goodman</i>	401
<b>Cong. Society v. Miller</b>	236	<b>Crain v. Paine</b>	73
<b>Conn v. Colburn</b>	131	<b>Cranch v. Kirkman</b>	143, 145
<b>Connelly v. Pierson</b>	241	<b>Cranmer v. Hill</b>	404
<b>Connor v. Bradley</b>	438	<b>Crawford v. Childress</b>	247
<b>Conover v. Wright</b>	367	<i>v. Cocks</i>	285, 325
<b>Conrad v. Nall</b>	200	<i>v. Liddle</i>	154
<b>Constantine v. Van Winkle</b>	371	<b>Creech v. Jones</b>	402
<b>Conway v. Kensworthy</b>	398	<b>Creesman v. Carter</b>	232
<i>v. Skrimpton</i>	457	<b>Crehore v. Mason</b>	200
<b>Conwell v. Buchanan</b>	240	<b>Creuse v. Defeguriere</b>	231
<b>Conyers v. Kenan</b>	55, 390	<b>Cripps v. Davis</b>	211
<b>Cook v. Clippard</b>	173	<b>Criswell v. Altemus</b>	397, 434
<i>v. Cook</i>	115	<b>Crocker v. Arey</b>	66, 206
<i>v. Danvers</i>	370	<i>v. Bragg</i>	300
<i>v. Lindsey</i>	192	<b>Crosby v. Wyatt</b>	133, 206
<i>v. Nicholas</i>	384	<b>Crosier v. Tomlinson</b>	70
<i>v. Rives</i>	136	<b>Cross v. Gannett</b>	92
<i>v. Sayer</i>	308	<b>Crowell v. Pebee</b>	401
<i>v. Wood</i>	21, 22	<b>Cullen v. Moteer</b>	429, 484
<b>Cooke v. Williams</b>	178	<b>Cummings v. Gassett</b>	236
<b>Coombs v. Jordan</b>	338	<i>v. Wyman</i>	390
<b>Cooper v. Smith</b>	390, 442	<b>Cunningham v. McKindley</b>	174
<b>Copen v. Auburn</b>	224	<i>v. Patton</i>	413, 477
<b>Copley v. Riddle</b>	394	<b>Curlewis v. Mornington</b>	325
<b>Coply v. Dorkmique</b>	81	<b>Currier v. Gale</b>	477
<b>Copp v. Lamb</b>	344	<b>Cushman v. Blanchard</b>	410

Cuthbert v. Cressy	294	De La Torre v. Barclay	211
Cutler v. Wright	204	De La Vega v. Viana	66, 67
Cutter v. Maker	128	Delancey v. Ganong	437
		Delaware, &c. v. Lee	301
		Demarest v. Wynkoop	29, 197, 198, 377, 456, 477, 481, 485
		Demerrett v. Batchelder	92
		Den v. Albough	381
		v. McCan	381
		v. Morris	377
		Dench v. Walker	304
		Denham v. Holeman	200
		Denn v. White	380
		Dennett v. Crocker	395
		v. Goodwin	107
		Dennis v. Anderson	196
		v. Barnard	380
		Denny v. Smith	204
		Denton v. Embury	181
		Derance v. Montgomery	115
		Deshler v. Cabiness	247
		Deshon v. Eaton	216, 236
		Desmoines v. Harker	37
		Devalcourt v. Dillon	328
		Devatch v. Newsam	381
		Devereux v. Duke of Norfolk	415
		Devine v. Bullock	304
		Dewdney, <i>ex parte</i>	232, 253
		Dewey v. Brown	348
		Dexter v. Arnold	459
		v. Penniman	268
		Deyo's Ex'rs v. Jones's Ex'rs	264
		Dicken v. Johnson	478
		Dickerson v. Morrison	22
		Dickey v. Armstrong	484
		Dickinson v. Breeden	404
		v. Hatfield	211, 239, 271
		v. McCanney	23, 231
		v. Williams	149
		Dickson v. Miller	294
		v. Thomson	209
		Didier v. Davidson	22, 69, 206, 236
		Dikeman v. Parrish	384
		Dilbone v. Moorer	170
		Dillard v. Philson	196
		Dillebaugh's Estate	367
		Dillon v. Mattox	378
		Dilworth v. Carter	82
		Dinsmore v. Dinsmore	239, 248
		Disborough v. Biddleman	260
		v. Jones	260
		Ditty v. Zeigler	50
		Dixon v. Deveridge	239
		v. Lyons	149
		Dobson v. Erwin	404
		v. Mackey	236, 238, 239
		v. Murphy	404
		D'Obree, <i>ex parte</i>	53
		Doe v. Brickett	439
<b>D.</b>			
Dabbs v. Humphreys	238		
Dally v. King	344		
Dalton v. Smith	76		
Danforth v. Culver	214, 215		
Daniel v. Ellis	385		
v. North	415		
v. Pill	236		
Darling v. Meacham	201		
v. Wells	207		
Darnell v. Adams	194		
Davenport v. Short	285		
v. Tirrell	423		
Davidson v. Beatty	395		
v. Harrison	240		
v. Morris	247		
Davidson's Lessee v. Beatty	392, 410		
Davies v. Crum	180		
v. Edwards	233, 240, 260		
v. Humphreys	132		
v. Smith	236		
Davis v. Cooke	481		
v. Converse	109		
v. Duffie	312		
v. Gordon	120		
v. Herring	228, 239		
v. Minor	22, 66		
v. Shoemaker	87		
v. Smith	144, 147		
v. Steiner	231		
v. Sullivan	192, 476		
v. Tiern	145, 150		
v. Tiernan	157		
Davy v. Field	181		
v. Oxenham	438		
Dawes v. Shed	170		
Dawson v. Callaway	285		
v. King	221		
Day v. Alverson	380		
v. Baldwin	260, 271		
Deal v. Patterson	22		
Dean, <i>ex parte</i>	50		
v. Dean	26, 174		
v. Hewett	247, 260		
v. Pitt	236		
Dease v. Jones	197		
Deaver v. Carter	131		
Debouch v. Turner	224, 247		
DeCordova v. Galveston	22		
Decouche v. Savatier	66, 167, 168, 174, 471		
De Forest v. Hunt	217		
De Kay v. Darrah	477		



## xxvii

Doe v. Brown	413	Dunham v. Dodge	260
v. Butler	410, 421	Dunlop v. Gibbs	294
v. Campbell	392, 413	Dunning v. Ocean Nat. Bk.	56
v. Danvers	377, 438	Dupleix v. De Roven	65, 479
v. Eslava	413	Durham v. Angier	114, 367
v. Grubb	390	Dyer v. Walker	149, 244
v. Hearick	404	Dyster v. Battye	309
v. Hellings	426		
v. Hulse	427	E.	
v. Jesson	480		
v. Jones	135, 477	Eager v. Commonwealth	479
v. Perkins	390	Eames v. Savage	117, 119
v. Prosser	389, 424, 433	Earle v. Reed	107
v. Shane	478	East India Co. v. Campion	30
v. Surtees	451	v. Paul	104, 137, 142,
v. Thompson	113, 392		181, 247
v. Wilkinson	439	Easterley v. Pullen	250
Doebler v. Snavelly	176, 178	Eastman v. Walker	239
Donnelly v. Donnelly	183	Easton v. Long	95
Don v. Lipman	66, 67	Eaton v. Sandford	482
Doolittle v. Blakesley	420, 484	Eckart v. Wilson	213
Doroure v. Jackson	484	Eckstein v. Shoemaker	22, 121
Dorr v. Swartwout	204, 206	Edgerton v. Bird	404
Dorsey v. Smith	370	Edmonds v. Goater	211
Doswell v. De La Lanza	413	Edmonstone v. Thompson	145, 149
Doughty v. Doughty	196	Edmunds v. Downer	211, 236
Douglas v. Elkins	131, 186, 231	Edwards v. Ingraham	142
v. Reynolds	128	v. University	174
Douglass v. Tullock	135	Eells v. Day	405
Dow v. Plummer	387	Effinger v. Henderson	149
v. Sayward	207	Egberts v. Dibble	66
v. Stephens	410	Elder v. Bradley	23
v. Warren	360, 477	v. Henry	87
Dowdall v. Byrne	384	Eldridge, in re	233
Dowell v. Webber	63, 196	Elkins v. Edwards	73
Dowland v. Foxall	48	Elkinton v. Newman	285
Dowling's Ex'r v. Ford	241, 249, 269	Ellicott v. Nichols	260
Downes v. Phoenix Bank	182	v. Pearl	398
Downey v. Garrard	181	Elliot v. Lawton	120
Downing v. Lindsay	325	Elliott v. Leeke	228
Drake v. Curtis	391	v. Locknane	22
Drane v. Hedges	323	Ellis v. Kelso	136
Draper v. Short	394, 396	v. Paige	448
Dray v. Marshall	451	Ellison v. Cathcart	405
Drayton v. Marshall	381	Elmendorf v. Taylor	25, 27, 382, 455,
Drew v. Drew	200		467, 473
v. Towle	405	Emerson v. Thompson	265
Drury v. Vannevar	107	v. Mills	231
Drysdale's Appeal,	71	Emery v. Day	114
Dubois v. Newman	394	v. Fell	76
Dudley v. Lindsey	82	Emmons v. Hayward	115, 181, 247
v. Price	330	v. Overton	240
Duff v. East Ind. Co.	154	Epes v. Dudley	264
Duffy v. Philips	231	Errom v. Turner	170
Dugan v. Gittings	25, 197, 382, 479	Erskine v. Messicar	204
Duke v. Harper	444	Erwin v. Bank of Mobile	170
v. Thompson	37	Espinoza v. Gregory	135, 467
Dumsday v. Hughes	346	Esselstyn v. Weeks	247
Dunden v. Gaskill	168		

Estes v. Blake	108, 247	Ferris v. Paris	181
v. Kyle	66	v. Ward	53
v. Stokes	181	Ferry v. Ferry	95, 110
Evans v. Cary	229	Ferson v. Sanger	25, 190
v. Davies	238	Fewell v. Collins	197
v. Galloway	312	Field v. Schieffelin	149
v. Hardeman	120	v. Wilson	183, 454
v. Lee	117	Fierze v. Thompson	239
v. White	82	Finch v. Lamb	323
v. Young	75	Finney v. Brandt	147
Everett v. Robertson	233	v. Cochran	167, 178
Ewell v. Tidwell	304	v. State	56
Ewer v. Jones	31	First Nat. Bk. of Utica v. Ballou	240, 261
Ewing v. Alcorn	396	Fisher v. Beasley	109
v. Burnet	386, 396, 404	v. Hess	231
Exeter Bank v. Sullivan	259	v. Harnden	23
		v. Pond	142, 309
		v. Tucker	176, 178, 251, 258
		Fishwick v. Sewall	55, 304
		Fiske v. Briggs	22
		v. Needham	236, 288
		Fitch v. Hillary	145
		v. Mann	402
		Fitzhugh v. Anderson	477
		Fitzrandolph v. Norman	400
		Flemming v. Colbert	186
		v. Griswold	477
		Fletcher v. Spaulding	66
		Flournoy v. Jeffersonville	328
		Flowers v. Foreman	65, 113
		Foley v. Hill	149, 296
		v. Jones	186
		Forbes v. Foot	200
		v. Lord Middleton	327
		v. Skelton	146, 155, 163
		Ford v. Babcock	206, 285
		v. Clements	197
		v. Laugée	285
		v. Phillips	315
		Forney v. Benedict	266
		Forster v. Cumberland R. R.	68
		v. Thompson	261, 330
		Forsyth v. Ripley	22
		Foster v. Bonner	311
		v. Dunbar	211
		v. Hodgdon	154, 163
		v. Jack	120, 148
		v. Scott	390
		v. Starkey	265
		Fowke v. Beck	406
		Fowler v. Hunt	200, 206
		v. Sharp	312
		Fox v. Baker	285
		v. Cash	174
		v. Fisk	165
		v. Smith	149, 157
		Foxcroft v. Barnes	390
		Frankersley v. Robinson	285

Franklin Acad. v. Hall	402	Gay v. Edwards	166
v. Camp	156	v. Moffit	394
v. De Priest	130	Gayette v. Bethune	390
Fray v. Garcelon	239	Gaylord v. Van Loan	214
Frazer v. Naylor	442	Geiger v. Brown	55
Freake v. Cranefeldt	42, 56, 169	Getchell v. Head	248
Frederick v. Gray	420, 432	Gibbons v. McCarland	234
Freeland v. McCullough	70, 80	Gibbs v. Cunningham	169
Freeman v. Baldwin	456	Gibson v. Bailey	381, 401
v. Stacy	87	v. Chouteau	38, 394
French v. O'Neil	142	v. Grosvener	231
v. Rollins	375	v. Jayne	375
Frewell v. Collins	478	v. Martin	394
Frey v. Kirk	22, 204, 221	v. People	241
Friedlander v. Bell	142	Giddings v. Smith	371
Frieland v. Heron	150	Gilchrist v. McLaughlin	390
v. McCullough	70	Giles v. Basemore	454
Fries v. Boisselin	213	Gilkey v. Pieler	423
Fritz v. Joiner	197	Gill v. Fauntleroy	371
v. Thomas	266	v. Pearson	379
Frosh v. Sweet	285	Gillespie v. Osborne	429
Frost v. Burrough	238	Gillet v. Stanley	421
v. Cloutman	339, 386	Gillon v. Bodington	142
v. Frost	56	Gilman v. Cutts	22, 200
Frye v. Barker	107, 269	v. Winslow	410
Fryeburg v. Osgood	240	Gilmer v. McMurray	231
Fullam v. N. Y. Union Ins. Co.	187	Gilmore v. Reed	75
Fullbright v. Tritt	313	Gilpin v. Smith	190
Fuller v. Van Geesen	406	Girard Bk. v. Bk. of Penn.	115
		Girdner v. Stevens	196
		Gittings v. Lowry	384
		Gittings's Lessee v. Hall	410
		Givens v. Robins	194, 323
		Glassington v. Rawlins	44, 46, 47
		Gleason v. Cuttle	181
		v. White	171
		Gleim v. Rise	213
		Glover v. Wilson	37
		Glyn v. Bank of England	241
		Goate v. Goate	269
		Goddard v. Ingraham	255
		Goewey v. Wing	395
		Gonzalus v. Hoover	392
		Goodhue v. Barnwell	468
		Goodman v. Munks	67
		Goodrich v. Pendleton	167, 296
		Goodright v. Forrester	371
		v. Cator	377
		Goodtitle v. Newman	437
		v. Parker	35
		Goodwin v. Buzzell	236, 261
		Goodwyn v. Goodwyn	234
		Gookin v. Sanborn	170
		Gordon v. Hobart	456
		v. Lewis	149
		v. Mounts	22
		v. Pearson	431
		v. Preston	67
		Gore v. Lawson	37
G.			
Gage v. Gage	401		
v. Hawley	200		
Gaines v. Conn's Heirs	345		
Galbraith v. Green	367		
Galbreath v. Galbreath	432		
Gale v. Capron	241		
Gallagher v. Milligan	213		
Galloway v. Ogle	437, 450		
Gallup v. Gallup	55		
Galusha v. Cobleigh	200		
Gamble v. Hicks	116		
Garden v. Bruce	247		
Gardiner v. Nutting	233, 250		
Gardner's Admr. v. Cumming	58		
v. McMahon	211		
v. Sharp	340		
v. Trustees & Co.	300		
v. Tudor	215		
v. Webber	113, 315		
Garfield v. Bemis	22		
Garland v. Chattel	317		
Garlick v. James	173		
Garlin v. Strickland	142		
Garraway v. Hopkins	65		
Garth v. Robards	200		
Gass v. Stinson	149		



Hapgood v. Burt	392	Hay v. Kramer	145, 149, 213
Harbaugh v. Moore	377	v. Fisher	66, 83
Harbold v. Kuntz	231	Hayden v. Bucklin	27, 330
Harden v. Palmer	206	v. Johnson	218
Harding v. Edgcumb	261	v. Williams	211, 236, 271
Hardy v. Ryle	48	Haydock v. Tracy	213
Hargrave v. Powell	431	Hayes v. Goodwin	109
Hargreaves v. Mitchell	169	Haymaker v. Haymaker	328
Harlan v. Seaton	204, 484	Haynes v. Wall	115
Harlock v. Jackson	37	Hays v. Cage	67, 196
Harman v. Claiborne	241	Hazzlebacker v. Reeves	231, 247
Harpending v. Dutch Ch.	24	Hazzleton v. Whitesides	266
Harper v. Fairley	240	Hea v. Manners	264
v. Pope	207	Head v. Wadham	77
Harris v. Christian	70	Head's Ex'rs v. Manners' Adm'r	225
v. Dennis	312, 327	Hearick v. Doe	404
v. Gray	488	Heath v. Grenell	265
v. Harris	117	v. White	373
v. King	169	Heckert's Appeal	167
v. Mills	73	Heiser v. Richel	397
v. Osborn	120, 148	Hellings v. Shaw	11, 211
v. Saunders	70, 83	Helm v. Howard	390
v. Wolford	318	Helms v. Otis	147
Harrisburg Bank v. Foster	186, 191	Helps v. Winterbottom	42, 101
Harrison v. Handley	225	Hemp v. Garland	111
v. Henderson	196	Hemphill v. McCleman	317
v. Hollins	464	Hemmenway v. Gates	468
Harriman v. Wilkins	142	Hemming v. Zimmerschitte	469
Hart v. Gregg	432	Henderson v. Baker	315
v. Hart	360	v. Foote	264
v. Nash	247	v. Griffin	369
v. Prendergast	211	v. Hamilton	95, 110
v. Stephens	262	v. Illsley	216
v. Ten Eyck	173	v. Whittaker	311
Hartland v. Jukes	95	Henlock v. Jackson	37
Hartley v. Hartley	38	Henry v. Thorp	22
Hartman v. Sharp	247	Henway v. Merry	315
Hartpole v. Walsh	461	Hercy v. Dinwoody	171, 172
Hart's Appeal	68	Hernandez v. Montgomery	62
Harvey v. Tobey	102	Herndon v. Pratt	178
v. Tyler	385	Hester v. Coats	404
Harwood v. Oglander	472	Hewlett v. Hewlett	207
Harwell v. McCulloch	226	Heyer v. Pruyn	73, 460
v. Steele	74	Heyling v. Hastings	210
Hasell v. Shelby	302	Hibernia Bank v. O'Grady	49
Hatch v. Smith	402	Hibbert v. Martin	142
v. Spofford	200	Hibler v. Johnson	145, 147
v. Vt. Central R. R.	395	Hicks v. Hicks	74
Hathaway v. Haskell	241, 252	v. Luske	260
Haven v. Foster	70	Hicks's Appeal	62
v. Hathaway	242, 261	Hickok v. Hickok	181
v. James	311	Higbee v. Bacon	168
Hawke v. Seuseman	391, 395	v. Rice	401, 429
Hawkins v. Barney	9, 22, 26, 66	Higginbotham v. Bennet	471
v. Campbell	22	Higgins v. Crawford	172
v. Robinson	401, 409	v. Scott	73
Hawks, <i>ex parte</i>	329	Higginson v. Mien	450
Hawley v. Cramer	178, 188, 382	Higgs v. Warner	150
v. Griswold	241	Higham v. Ridgway	242

Hill v. Bellows	206, 207	Houseall v. Gibbs	174, 178, 181
v. Henry	95, 247	Housen v. Irving	261
v. Josselyn	37	Houston v. Bibb	304
v. Myers	307	Hovenden v. Lord Annesley	9, 26, 166, 178, 183, 437, 445, 468
v. Krick	22	How v. Shepard	149
v. Wilson	404	Howard v. Aiken	468
Hinch v. Weatherford	22	v. Reedy	384
Hinckley v. Walters	74	v. Ritchie	299
Hindsman v. Worthen	395	v. Sherwood	388
Hinman v. Cranmer	379	Howe v. Saunders	108
Hinsdale v. Larned	142	v. Thompson	241, 269
Hoare v. Peck	294	Howell v. Hair	194, 304
Hobart v. Conn. Turnpike Co.	55	v. Howell	22
Hobbs v. Ballard	304	v. Young	136, 137, 142
Hobson v. Todd	300	Howland v. Cuykendall	95
Hockenburgh v. Snyder	396	v. Edmonds	95
Hodgdon v. Chase	247	Hoy v. Perry	396
Hodle v. Healy	458	Hoyt v. Reed	100, 106
Hodsden v. Harris	86, 87	Hubbard v. Austin	401
Hodson v. Harridge	286	v. Little	381
v. Sharp	437	Hubbell v. Condry	66, 84
Hoffsetter v. Boonville	420	Huber v. Steiner	66, 67
Hogan v. Bear	213	Hudson v. Carey	213, 487
Hoggett v. Emerson	67	v. Wheeler	285
Holbrook v. Hunt	224	Huff v. Richardson	239
Holcomb v. Tracy	22	Hughes v. Edwards	454, 460, 471
Holden v. Fletcher	170	v. Wynne	169
v. James	22	Hughs v. Paramore	271
Holdfast v. Shepard	413	Humann v. Pettet	384
Hole v. Rittenhouse	391	Humbert v. Trinity Church	27, 294
Holland v. Hatton	452	Humphreys v. Jones	236
Hollingshed v. Nauman	413	Hunna v. Renfro	404
Hollis v. Francois	50	Hunt v. Bourne	375
v. Palmer	243, 285	v. Bridgeham	241, 249
Holmes v. Green	244, 250	v. Burk	116
v. Kerrison	97	v. Ellison	25
v. Mackrell	233	v. Spalding	316
Holt v. Hemphill	394	v. Taylor	134
Holton v. Whitney	414	v. Wilkinson	236
Holtzapple v. Phillibaum	378	Hunter v. Chrisman	403
Homer v. Fish	186	v. Hunter	183
Honey v. Honey	72	v. Parsons	405
Hood v. Hood	413	v. Starke	247
Hooper v. Garver	379	Huntington v. Babbitt	265
v. Stevens	247	v. Brinkerhoof	325
Hope Ins. Co. v. Weed	95	v. Mather	456
v. Perkins	95	v. Whaley	385
Hopkins v. Banks	260	Huntley v. Wharton	238
v. Cockerell	73	Hurst v. Durnell	406
v. Hopkins	181	v. Parker	209
v. Robinson	390	Hutchinson v. Bank of Wheeling	63
Hopkirk v. Bell	488	Hutsonpiller v. Storer	196
Hord v. Lee	265	Hyde v. Dallaway	459
v. Walton	414	v. Johnson	272, 278
Horsfield v. Cost	304	v. Partridge	31
Horton v. Horner	67	Hyman v. Gray	179, 181
Hoskins v. Hoskins	475	Hysenger v. Baltzell	205, 206
Houghton v. Mann	107		
v. Field	135		

I.

Iddings v. Cairnes	429
Iler v. Routh's Heirs	390, 421
Illies v. Fitzgerald	128
Ilisley v. Jewett	240, 283
Incorporated Soc. v. Richards	336
Ingersoll v. Lewis	379
Inglis v. Haigh	69, 70, 153, 155
v. Sailors' Snug Harbor	339, 347, 367
Ingraham v. Bowie	207
v. Regan	196
v. Sherard	145, 149
Inhabitants of Stoughton v. Baker	37
Inman v. Barnes	6, 333, 355
Irving v. Veitch	104
Isaacs v. Price	312
Iverson v. Dubose	37
Ivey v. Gamble	290
Ivins v. Schooley	323, 328
Ivory v. Owens	72

J.

Jackson v. Bosburg	394
v. Bradt	421, 484
v. Brink	429
v. Brinkerhoff	418
v. Brooks	22, 312
v. Caines	877, 477
v. Carey	385, 446
v. Creal	404, 430
v. Croy	440
v. Crysler	377
v. Davis	380, 438, 443
v. Denison	384
v. Diffendorf	380
v. Dysting	380
v. Eddy	53
v. Ellis	390, 414
v. Fairbank	240, 253
v. Fuller	448
v. Green	448
v. Halstead	391
v. Harsan	443
v. Haviland	377
v. Hogeboom	394
v. Horton	325
v. Howe	392
v. Hubble	381
v. Hudson	412
v. Ingraham	411
v. Jackson	371
v. Jadwin	390
v. Johnson	372, 481
v. Joy	390
v. Kisselbrack	446

Jackson v. Lamphire	22
v. Leggett	418
v. Leonard	413
v. Lewis	391
v. Loughhead	449
v. Lunn	377
v. Miller	442
v. Moore	429, 477
v. Myers	454
v. Newcomb	394
v. Newton	380, 390, 404
v. Oltz	381
v. Pontes	381
v. Porter	389, 400, 412
v. Raymond	441
v. Reynolds	437
v. Rightmyer	380
v. Robbins	477
v. Rogers	387, 407
v. Sackett	73, 78, 92
v. Sample	484
v. Sellick	371, 394, 483
v. Sharp	390, 404
v. Shoonmaker	371, 377, 390, 395, 483
v. Smith	6, 401
v. Steinberg	437
v. Stevens	390
v. Thomas	385, 401
v. Tibbets	429
v. Todd	385, 404, 418
v. Valkenburgh	50
v. Vandenburg	418
v. Van Vosburg	446
v. Varick	285
v. Vermylyea	401
v. Warford	391, 401
v. Waters	390, 404, 411
v. Welden	445
v. Wheat	380, 390, 404, 477
v. Whitbeck	407, 433
v. Whitford	437
v. Wilsley	453
v. Wood	454
v. Woodruff	403, 408
v. Wooley	275
Ins. Co. v. Stewart	196
Jacobs v. Graham	42, 50
James v. Biscoe	324
Jasper v. Potter	24
Jay v. Allen	33
Jayne v. Mackey	166
Jenkins v. Dawes	107
Jerrist v. Weare	387
Jewett v. Green	313
v. Pettit	240
Jilson v. Gilbert	120
Johnson v. Albany & Sus. R. R. Co.	22, 67

Johnson v. Ames	170	Keith v. Estill	84
v. Beardslee	248, 260, 264	Kelly v. Sanborn	218
v. Farwell	315, 318	Kelsey v. Griswold	304
v. Gilfillan	130	Kemp v. Westbrook	173
v. Green	285	Kemper v. Adams	381
v. Harris	484	Kennebunk v. Smith	38
v. Johnson	190	Kennedy v. Carpenter	100
v. Nash	414	v. Reynolds	378
v. McIntosh	412	v. Townley	38, 390
v. McMillan	400	Kenney v. Lee	312
v. Rutherford	116	Kenney's Ex'rs v. McClure	181
v. Smith	178, 484	Kenniston v. Avery	275
v. White	304	Kenoshee v. Lamson	95
Johnston v. Irwin	38, 394	Kensington Bank v. Patton	231
Joiner v. Perry	131	Kent v. Wilkinson	221
Jones v. Borden	37	Keplinger v. Griffith	221
v. Conoway	186	Kerby v. Jacobs	25
v. Hays	214	Kerrison v. Williams	73
v. Hoar	72	Kidd v. Chapman	170
v. Hockman	385	Kiddall v. Trimble	867
v. Jones	22, 67, 304	Kilbourn v. Lockman	22
v. Lewis	120	Kimball v. Brown	145, 149, 156
v. Lightfoot	115, 170	v. Ives	25, 167
v. Moore	213, 214, 266, 289	v. Whitney	84
v. Persons	468	Kimm v. Osgood	50
v. Pingree	154	v. Fuller	99
v. Pope	80	Kimmel v. Schwartz	227
v. Porter	390	Kincaide v. Louge	395, 401
v. Ridley	396	Kinder v. Paris	289
v. Ryder	274	King v. Adderly	44, 45, 46, 47, 49
v. Scott	264	v. Aughtry	55
v. Trimble	128	v. Baker	196
v. Tubeville	172	v. Baldwin	249
Jordan v. McKenzie	204	v. Beeston	77
v. Robinson	80, 84	v. Dowdall	50
v. Thornton	198, 304, 484	v. King	75
Joselyn v. Stone	37	v. Lane	66
Joslyn v. Smith	260	v. Smith	391, 401, 414
Joy v. Adams	73	v. Walker	200
v. Thompson	22	Kinsman v. Wright	107
Judd v. Sampson	148	Kirk v. Smith	384, 406
		Kirkland v. Krebs	488
		Kirkman v. Phillips	304
		v. Siboni	285
		Kisler v. Kisler	471
		Kinsell v. Daggett	390
		Kite v. Brown	401
		Kitteredge v. Brown	218, 239
		Kline v. Guthart	262
		Knapp v. Clark	82
		Knipe v. Knipe	145, 149
		Knott v. Farran	211
		Knotts v. Butler	132
		Knox v. Cleveland	22, 66
		v. Gye	171
		v. Hook	404
		v. Silloway	429
		Kolheim v. Harrison	174
		Kyger v. Ryley	92, 241
<b>K.</b>			
Kampshall v. Goodman	288		
Kane v. Bloodgood	25, 26, 87, 166		
v. Cook	170, 178, 188, 294, 469		
Karver v. James	318, 327		
Kaufman v. Fisher	275		
v. Kaufman	196		
Keaton v. Greenwood	174		
v. McGivier	174		
Keech v. Hall	449		
Keene v. Deardon	474		
Keener v. Crull	269		
Keeton v. Keeton	190, 197, 198, 201		



## XXIV

Kyle v. Wells	231
v. Tubbs	400
L.	
Lacon v. Briggs	210
Lafarge v. Jayne	95, 236
Lalonde v. Ruddock	203
La Frombois v. Jackson	384, 404, 411
Lagow v. Neilson	317
Lagton v. The State	199
Lahitte v. Smart	484
Lamar v. Jones	456
Lamb v. Clark	72
v. Foss	384
Lander v. Rounseville	405
Landes v. Perkins	196
Lane v. Doty	260
v. Kennedy	41
v. Morris	80
v. National Bank	200
Lang v. Phillips	50, 53
Langdon v. Dowd	200
v. Potter	410, 440
Langworthy v. Myers	398
Lansing v. Goelet	456
v. Star	29
Lapham v. Briggs	107
Larman v. Huey	419
Larthet v. Hogan	269, 285
Lastropas v. Roquette	75
Lathrop v. Snellbaker	136
Latourette v. Cook	84
Law v. Harwood	301
v. Patterson	432
Lawrence v. Hopkins	214
v. Hunter	397
v. Mangum	231
v. Trustees, &c.	26, 183, 196
Lawrence Co. v. Dorntale	275
Lawson v. Cunningham	304
Lawton v. Bowman	62
Lea v. Polk Co. Copper Co.	404
Leake v. Lawrence	133
Leasure v. Mahoning Township	61
Leaper v. Tatton	288
Leavitt v. Gooch	161
Lee v. Gauze	55
v. Norris	38
v. Perry	224
Lee's Adm'r v. Polk's Ex'rs	224
Lefavor v. Holman	432
Leffingwell v. Warren	135, 380
Legare v. Frazer	131
Leinhardt v. Forringer	115, 122
Leigh v. Smith	285
v. Thornton	70
Leman v. Newnham	453
Leonard v. Hill	844
v. Leonard	69, 428
v. Pitney	185
Le Roy v. Crowninshield	7, 22, 64, 65, 66, 67, 208
Lesem v. Neal	142
Lessee of Cincinnati v. First Pr. Ch.	38
Lester v. Garland	43, 46, 48, 53
v. Jenkins	315
v. Redmond	82
Lethieullier r. Tracy	475
Levasser v. Washburn	37
Levistones v. Marigny	247
Levy v. Cadet	259
Lewis v. Bacon	264
v. Barksdale	477, 484
v. Baird	482
v. Broadwell	55, 63
v. Marshall	9
v. Moreland	142
Lexington v. Ohio R. R. Co.	178
Lichty v. Hegers	120
Lincoln v. Battelle	66, 67
v. Newhall	108
v. Purcell	115
Linsell v. Bonsor	211
Lion v. Burtis	441
Litchfield v. Ready	369
Liter v. Green	343
Little v. Blunt	45, 95, 96, 207, 269, 288
v. Downing	408
v. Megquier	409
v. Price	196
Littlejohn v. Gordon	92
Littler v. Smiley	120
Livermore v. Johnson	186
Livingood v. Livingood	75
Livingston v. Ostrander	288
v. Pendergast	404
v. Peru Iron Co.	410
v. Proseus	418
Llewellyn v. Mackworth	473
Lloyd v. Gordon	401
v. Williams	109
v. Spillet	471
Lockey v. Lockey	69
Lockhart v. Eave's Adm'r	224
Lockwood v. Wildman	484
Lodge v. Patterson	429
Lofton v. Aldridge	231
Lomax v. Pendleton	127
Lombard v. Pease	216
Long v. Jameson	231
v. Mast	390
v. Orrell	328
v. White	27

Long v. Young	391	Manton v. Titsworth	167
Longwood v. Bentley	444	Marcy v. Marcy	430
Longworth v. Hunt	183	Markal's Case	341
v. Taylor	92	Markle v. Birch	200
Lonsdale v. Brown	236	Markley v. Amos	384
Lord v. Morris	285	Marks v. Pell	458
Loring v. Hulling	50	Mars v. Southwick	147
v. Whittemore	79	Marseilles v. Kenton	161, 231, 247
Lorman v. Clark	24, 28	Marsh v. Burroughs	22
Lott v. Degraffenreid	183	v. Oliver	167
Love v. Hackett	240	v. Weir	404
Lovering v. Rittenhouse	55, 74	Marshall v. Dalliber	217
Lovett v. Noble	400	Marsteller v. McClean	484
Lowber v. Smith	149	Martin v. Bank	169
Lowe v. Jones	56	v. Bowker	454
Lowell v. Bellows	142	v. Bridges	254
Lowery v. Gear	244	v. Broach	238
Lowther v. Chappel	260	v. Delboe	150, 153
Lowry v. Lawrence	312	v. Gage	169
Loyd v. Gordon	429	v. Heathcote	154
Lucas v. Daniels	174, 304	v. Jackson	449, 468
v. Dennison	458	v. Letty	199
v. Thorrington	236	v. Martin	22
v. Tunstall	22	v. Mayor of Brooklyn	72
Luck v. Duff	394	v. Smith	419
Ludlow's Heirs v. McBride	414	v. Waugh	223
Luma v. Edmiston	236	v. Williams	268
Lund v. Parker	401	Martindale v. Faulkner	120
Lunn v. Johnson	25	Marvin v. Bates	201
Lynch v. Withers	323	v. Hotchkiss	406
Lyle v. Murray	181	Mask v. Philler	239
Lyman v. Norwich Univ.	261	Maskell v. Pooley	241
Lyon v. Marclay	166, 167, 178, 472	Mason v. Crosby	25
v. State Bank	96, 247	v. Howell	247, 260
Lytle v. Mehabby	135	v. Walker	343
		Mass. Turnp. Co. v. Field	186
		Master, Warden, &c. v. Loder	76, 79
		Masters v. Dunn	204
		Mathers v. Trinity Church	380, 410
		v. Green	142
		Mathes v. Bennett	167
		Mathews v. Hopkins	73
		Matilda v. Cranshaw	192
		Matthewson v. Trot	388
		May v. Slaughter	200
		v. Rumney	367
		May's Heirs v. Hill	371
		Mayo v. Rogers	318
		Mayor, &c. v. Horner	88
		Mazyck v. Wright	414
		McArthur v. Carvey	304
		McBride v. Gray	231
		M'Call v. Neely	401, 405
		M'Carey v. M'Kerson	223
		M'Cartee v. Camel	26
		M'Carty v. Fourcher	396
		M'Carthy v. White	23
		M'Clellan v. Crofton	145, 150, 157, 162, 216

M'Clung v. Ross	390, 433	Meade v. M'Dowell	250
M'Clure v. McClure	70	v. Bandon	455
M'Cluny v. Silliman	23, 24, 66, 70	Meadows v. Dick	166
M'Coon v. Galbraith	181	Meanor v. Hamilton	4
M'Coy v. Dickinson Coll.	414	Means <i>et al.</i> v. Welles <i>et al.</i>	421
M'Crea v. Piermont	27	Medlicott v. O'Donnell	473
M'Culloch v. Dawes	211, 264	Meese v. Keefe	484
v. Judd	161	Megginson v. Harper	246
M'Cullough's Administrator v.		Mehaffy v. Dobbs	432
Speed	55, 197	Mellus v. Snowman	371
M'Donald v. Sims	178, 454	Mellick v. Seelherst	227
v. Schneider	402	Melling v. Leak	468
M'Donnell v. Bank of Montgom-		Mellville v. Brown	304
ery	181	Melvin v. Proprietors, &c.	413
M'Dowell v. Young	186	Mengies v. Frick	50
v. Goldsmith	167	Menkens v. Blumenthal	414
v. Grodmyn	115	Menter v. Stewart	302
v. Potter	181	Mercer v. Ogilvie	46
M'Elmoyle v. Cohen	65, 66, 84	v. Selden	197, 477
M'Evoy v. Lord	401	v. Watson	390, 395
M'Fadzen v. Olivant	308	Merceir v. Burton	304
M'Farland v. Stone	477	Merceron v. Merceron	285
M'Farlane v. Kerr	391	Merle v. Andrews	181
M'Gbee v. Green	241	Merraman v. Caldwell	371
M'Glenney v. Flemming	223	Merriam v. Hayes	413
M'Gowan v. Crooks	402	v. Leonard	233, 240
M'Intire v. Oliver	260	Merrills v. Swift	233
M'Iver v. Ragan	384, 414, 486	Merryman v. The State	285
M'Kean v. Thorp	228	Metcalf v. Robinson	76
M'Kehan v. Com.	36	Michoud v. Girod	26, 183, 470
M'Kenas v. Gardner	136	Mickle v. Lucas	392
McKenny v. Sugden	269	Midford v. Hardinson	429
M'Kenny v. M'Kenney	22	Miles v. Barry	185
M'Kenney v. Springer	22, 120	v. Moodie	213
M'Ketcher v. Hall	449	Milldam Corp. v. Bullfinch	390
McKinzie v. Hill	56	Millay v. Millay	384
M'Knight v. Taylor	171	Milledge v. Gardner	79
M'Koun v. Whitman	187	Millegan v. Dickinson	394
McLane v. Ashby	190	Miller's Appeal	421
McLaren v. McMartin	265	Miller v. Adams	142
McLean v. Ruysdale	131	v. Caldwell	211
McLellan v. Kellogg	404	v. Dorsey	266
McLinn v. M'Namara	188, 223	v. Ewing	375
M'Masters v. Bell	379	v. Helm	73
M'Millan v. Hafley	394	v. Lancaster	216
v. Wood	204	(Lessee of) v. Lindsay	37
M'Nair v. Dodge	59	v. Miller	42, 123
v. Funt	390	v. Mitchell	167
v. Kennon's Ex'rs	182	v. M'Intyre	26, 330, 369
v. Lot	454	v. Platt	390
McNamee v. United States	39	v. Sarle	442
M'Naughten v. Norris	145	v. Shaw	378, 392
McNeely v. Langan	414	v. Shackleford	371
McQueen v. Babcock	23	v. Trustees of Jeff. Coll.	73
v. Ivey	405	Milner v. Brightman	371
McQuesney v. Heister	87	Milnes v. Cowley	167
M'Raa v. Smith	440	Mills v. Fowkes	146, 148, 274
M'Rea v. Leary	239	v. Glover	56
v. Williams	401	v. Taber	223



# INDEX TO CASES CITED.

xxxix

Niagara Bank <i>v.</i> Plumb	138
Nichols <i>v.</i> Reynolds	410
<i>v.</i> Todd	390
Nimmo <i>v.</i> Walker	115
Nimmo's Ex'r <i>v.</i> Com.	37
Nolasco <i>v.</i> Lurty	90
Norris <i>v.</i> Hundred of Gantris	44, 45, 47, 49
North <i>v.</i> Hammer	404
North's Administrator <i>v.</i> Barnum	468
Northrop <i>v.</i> Hill	136
<i>v.</i> Wright	404
Northcut <i>v.</i> Wilkinson	265
Norton <i>v.</i> Ellam	95
Noyes <i>v.</i> Hall	247
<i>v.</i> Dyer	401

## O.

Oakes <i>v.</i> Mitchell	216, 264
Oatman <i>v.</i> Fowler	390
Obree, <i>ex parte</i>	53
O'Connor <i>v.</i> Towns	50
O'Dee <i>v.</i> M'Crane	168, 170
Odin <i>v.</i> Greenleaf	151
Ogden <i>v.</i> Saunders	22
Oliver <i>v.</i> Berry	197
<i>v.</i> Gray	221
<i>v.</i> Thomas	82
Ontario Bank <i>v.</i> Rathbun	321
Orbeson <i>v.</i> Morrison	410
Orcutt <i>v.</i> Berrett	262
Ord <i>v.</i> Henning	461
<i>v.</i> Ruspini	75, 147
<i>v.</i> Smith	458
Ormond <i>v.</i> Martin	406
Ormsby <i>v.</i> Longworth	183
Orrell <i>v.</i> Maddox	374, 438
Ostram <i>v.</i> Curtis	167
Oswald <i>v.</i> Leigh	93
Otway <i>v.</i> Ramsay	83
Outcall <i>v.</i> Ludlow	407
Overfield <i>v.</i> Christie	388, 413
Overing <i>v.</i> Russell	380
Overseers, &c. <i>v.</i> Otis	349
Overstreet <i>v.</i> Bates	178, 468
Overton <i>v.</i> Davisson	390
<i>v.</i> Tracy	112
Owen <i>v.</i> Campbell	367
Ozias <i>v.</i> Johnson	69

## P.

Packard <i>v.</i> Swallow	327
Paddleford <i>v.</i> Dana	22
Paddock <i>v.</i> Colby	231
Paderick <i>v.</i> Searle	380

Paff <i>v.</i> Kinney	27, 167
Page <i>v.</i> Selfby	384
Paige <i>v.</i> Hughes	178
Pain <i>v.</i> Packard	249
Paine <i>v.</i> Drew	204
Painter <i>v.</i> Smith	115
Palethorp <i>v.</i> Furnish	261
Palmer <i>v.</i> Butler	269
<i>v.</i> City of New York	148
<i>v.</i> Eyre	453
<i>v.</i> Shaw	206
Pancoast <i>v.</i> Addison	200
Park <i>v.</i> Cochran	418
Parker <i>v.</i> Ash	172
<i>v.</i> Grayson	318
<i>v.</i> Gregory	372
<i>v.</i> Hull	204
<i>v.</i> Irwin	285
<i>v.</i> Merrill	260
<i>v.</i> Obear	367
<i>v.</i> Parker	394
<i>v.</i> Proprietors	404, 418, 429
<i>v.</i> Southwick	395
<i>v.</i> State	37
Parkman <i>v.</i> Osgood	170
Parmelee <i>v.</i> McNutt	37
Parson <i>v.</i> M'Cracken	477
Parsons <i>v.</i> Chamberlin	51
Partridge <i>v.</i> Beere	452
Pastorias <i>v.</i> Fisher	300
Patrick <i>v.</i> Chenault	371
Patton <i>v.</i> Eaton	400
Patton's Adm'r <i>v.</i> Ash	213
Patterson <i>v.</i> Cobb	231
<i>v.</i> Choate	260
<i>v.</i> Gaines	22
Pawlett <i>v.</i> Clark	386
Paxson <i>v.</i> Bailey	405
Paxton <i>v.</i> Rhea	123
Payne <i>v.</i> Bullard	166
<i>v.</i> Gardner	95, 115
<i>v.</i> Harris	60, 168
<i>v.</i> State	115, 260
Peaceable <i>v.</i> Read	426, 432
Peachy, <i>ex parte</i>	146
Pearce <i>v.</i> House	477
<i>v.</i> Patton	22
Pearpoint <i>v.</i> Graham	43, 49
Pearsall <i>v.</i> Thorp	401
<i>v.</i> Dwight	66, 285
Pearson <i>v.</i> Darrington	231
Pease <i>v.</i> Hirst	246, 276
<i>v.</i> Howard	79, 82, 83, 85, 87
Peaslee <i>v.</i> Breed	95, 125, 255
Pecham <i>v.</i> Raynal	260
Peck <i>v.</i> Botsford	217, 232, 265
<i>v.</i> N. Y. Steamship Co.	120, 149, 244
<i>v.</i> Randall	196, 477

Peckett v. King	233	Pierce v. Conant	109
Pederick v. Searle	413	v. Crofts	70
Peebles v. Mason	239	v. Tobey	22, 248, 284
Pegram v. Stoltz	285	Pickard v. Valentine	99
Pejepscot Prop. v. Nichols	390	Pickering v. Lord Stafford	172
Pellew v. Hundred of Wenford	48	Pickett v. King	283
Penaro v. Flourney	231	Piggot v. Rush	70, 193, 292
Pender v. Jones	458	Pigott v. Nowen	330
Pendergrast v. Foley	196	Pike v. Warren	248, 260
v. Gullatt	405, 484	Pillow v. Roberts	404
Penn v. Klyne	406	Pimental v. San Francisco	312
v. Crawford	231	Pindar v. Wadsworth	300
v. Watson	147	Pipher v. Lodge	174, 404, 471
Penniman v. Rotch	147, 149	Piquet v. Curtis	98
v. Vinton	89	Pitkin v. Rousseau	142
Pennock v. Freeman	186	Pitman v. Foster	209, 262
v. Hart	318	v. Hooper	33
People v. Arnold	37	Pitt v. Wooten	260
v. Clark	37	Pitts v. Holmes	107
v. Everest	26, 27	v. Hunt	275
v. Gilbert	12, 37	Pittsburg R. R. Co. v. Byers	115
v. Supervisors of Col. Co.	22, 37	v. Graham	115
Peppard v. Deal	430	v. McCully	115
Perham v. Reynal	248	Planck v. Anderson	142
Perkins v. Blood	384	Plant v. Cotterill	306
v. Brastow	275	Planters' Bank v. Bank of Alex-	
v. Dunham	393	andria	63
v. Cartwell	26, 29, 90, 174	Platt v. Smith	128
v. Pitts	449	Pleake v. Chambers	414
v. Rogers	196	Podder v. Carter	131
Perley v. Little	209, 216	Podger's case	379, 385
Perry v. Fisher	293	Poe v. Foster	178
v. Griffith	95	Poignard v. Smith	383, 390, 401, 418
v. Jackson	204	Polk v. Allen	55
v. Jenkins	55	Pomfret v. Windsor	474
v. Lewis	66	Pond v. Williams	231, 244
v. Marston	458	Poor v. Robinson	347
Peters v. Barnhill	131	Pope v. Bowman	134
Peyton v. Minon	247	Popkin v. Hewlett	56
Phalen v. Clark	183	Porter v. Dugat	390
Phares v. Walters	22	v. Blood	247
Phelps v. Brewer	233	v. Hammond	446
v. Henry	384	v. Hill	216, 236, 269, 434
v. Patterson	120	v. McGinnis	401
v. Stewart	219, 231	v. School Directors	178
v. Williamson	219	Porterfield v. Clark	24, 394
Philips v. Mahan	241	Pott v. Clegg	182
v. Philips	235, 237	Potts v. Gilbert	392, 399, 413
Phillips v. Broadley	120	Poughkeepsie v. Ibbotson	249
v. Cage	70	Powell v. Harman	400
v. Pope	23	v. Smith	128, 131
v. Peters	269	Powers v. Southgate	262
v. Rogers	25	Powsely v. Blackmore	447, 452
v. Sinclair	456	Pray v. Pierce	390
Phillips's Lessee v. Robertson	444	v. Price	390
Piatt v. Vattier	26, 382, 472	Prenatt v. Runyan	149
Pierce v. Brewster	211	Presbrey v. Williams	45, 98
v. Chase	149	Prescott v. Jonser	135
		v. Nevers	387, 400, 429

# INDEX TO CASES CITED.

xli

Presley v. Davis	167	Ray v. Barker	384
Preston v. Briggs	304	v. Goodman	406
Prevost v. Gratz	470	v. Smith	380
v. Johnson	401	Raymond v. Simmonson	186
Prewett v. Buckingham	69, 167	Rayner v. Lee	413
v. Hilliard	68	Read v. Boyd	84
Price v. Copner	458, 465	v. Goodyear	390
v. Luter	312	v. Hurst	241
v. Price	231, 247	v. Markle	304
v. Slaughter	192	v. Thompson	384
Pridgen v. Hill	147	v. Wilkinson	212, 214
v. McLean	147	Reading v. Rawsterne	384, 419
Prince v. Heylin	69	Reddington v. Julien	82
Pritchard v. Chandler	107	Redwood v. Riddick	468
v. Draper	248, 257	Reed v. Clarke	285
v. Spencer	22	v. Field	396
Proctor v. Cowper	457	v. Flippen	131, 133
Proprietors, &c. v. Call	394	v. Johnson	233
v. Laboree	377, 409	v. Minnell	196
v. McFarland	387, 406	Reeks v. Postlethwaite	459
v. Springer	390, 401	Reeves v. Dougherty	27
v. Skinner	394	v. Hearne	274
Pruley v. Waterhouse	200	Reg. v. Axbridge	390
Packel v. Moore	285	Regis v. Hebert	126
Pulteney v. Warren	30	Reid v. Eibert	401
Purvell v. Blannerhassett	330	Reigal v. Wood	463
Purdon v. Purdon	146, 150	Rense v. Southard	187
Purdy v. Austin	214	Reynolds v. Doyle	100, 128
Purley v. Little	236	v. Hamilton	267
Putnam v. Bowker	395	Rhines v. Evans	181
v. Dike	65	Rhode Island v. Massachusetts	380
Pynson v. Ivey	178	Rhodes v. Allen	236
		v. Smethurst	42, 56
		Ricard v. Williams	382, 421, 437
		Rice v. Burt	186
		v. Pacific R. R. Co.	110
		v. Stearns	269
		v. White	185
		Richard v. Talbird	367
		Richards v. Maryland Ins. Co.	54, 89, 326
		v. Nightingale	116
		v. Polgreen	84
		Richardson v. Bleight	75
		v. Broughton	406
		v. Curtis	204, 206
		In re	53
		v. Thomas	196, 233, 265
		v. Whitefield	477
		Richman v. Richman	96
		Richmond v. Fugua	236
		v. Md. Ins. Co.	23
		(Petr.)	265
		Riddle v. Krunbicht	75
		v. Mandeville	170, 171
		Riden v. Frien	484
		Rider v. Union, &c.	70
		Ridgley v. Ogle	377, 401
		v. Steamboat, &c.	22
Q.			
Quackenbush v. Elde	115		
Quantock v. England	210		
Quigg v. Kittredge	115		
Quimby v. Buzzle	108		
Quynn v. Carroll	265		
R.			
Rabe v. Fyler	444		
Rackham v. Marriott	211, 247		
Rakestraw v. Brewer	462		
Ralph v. Bagley	401		
Ramchanden v. Hammond	145, 150		
Ramsay v. Dens	178		
v. Warner	244		
Randall v. Wilkins	206		
Randolph v. King	65		
Rank v. Hill	86		
Rankin v. Ten Brook	477		
v. Woodworth	52, 137		
Rawdon v. Tobey	231, 247		





# INDEX TO CASES CITED.

xliii

Schermerhorn v. Schermerhorn	325	Short v. Bryant	131
Schlosser v. Leshner	318	v. McCarthy	137, 142, 184, 304
School Directors v. Georges	38	Shortall v. Hinckley	418
School Dist. v. Blakeslee	407	Shreve v. Joyce	264
Schroeppel v. Corning	109	Shumway v. Holbrook	433
Schultz v. Lindall	402	Shutz v. Baldwin	285
Schwartz v. Kuhn	390, 402	Sibley v. Lambert	241, 247
Scott v. Gallagher	474	v. Phelps	107, 241
v. Hancock	170	Sicard v. Davis	381
v. Jones	169	Sichel v. Carrillo	67, 92
v. McIntosh	69	Siglar v. Van Riper	421
v. Nichols	131	Sigourney v. Drury	240, 247, 248, 270
Scudemore v. White	145	v. Severy	107
Scull v. Wallace	213, 266	v. Wetherell	240, 248
Scurry <i>qui tam</i> v. Freeman	109	Simpson v. Ammons	448
Seaber, <i>ex parte</i>	146	v. Geddes	258
Searle v. Lord Barrington	241	v. Lassalle	82
Searight v. Craighead	259	v. Shannon	484
Seay v. Bacon	204	Simmons v. Lane	404
See v. Greenhorn	394	v. Nahant	432
Scig v. Acord	265	Simons v. Fox	304
Selectmen, &c. v. Boylston	168	Sims v. Brutton	142, 181
Semmes v. Hartford Ins. Co.	196	v. Hampton	43, 50
v. Magruder	265	v. Meacham	394
Sennott v. Homer	236	v. Radcliffe	288
Sewall v. Valentine	170	v. Sims	62
Seward v. Lord	236	Sinclair v. Bank	136
Seymour v. Delaney	390	Singles v. Hastings	394
v. Deming	207	Singleton v. Herriott	110
Shackleford v. Douglas	231, 247	v. Moore	178
v. Smith	400	Sinkler v. Indiana	115
Shannon v. Kinney	414	Skidmore v. Romaine	196, 285
Sharp v. Ingraham	421	Skyles v. King	396
v. McGuire	312	Slack v. Norwich	219
Sharts v. Curtis	167	Slade v. Smith	394
Shattuck v. Shattuck	149	Slater v. Cave	22
Shaw v. Allen	239	v. Lawson	252
v. McLellan	409	v. Ransom	381
v. Nicoll	237, 413	Slaymaker v. Boyd	73
Shearman v. Atkins	117	v. Wilson	173, 304
v. Irvine's Lessee	377, 380	Sledge v. Clopton	197
Shelburne v. Robinson	116	Slee v. Manhattan Co.	456
Shelby v. Guy	66, 67, 201	Sleeth v. Murphy	22
Sheldon v. Sheldon	174	Sleight v. Kane	200
Shelton v. Cocke	248, 258	Slice v. Derrick	401
Shepherd v. Hill	80	Sloan v. Waugh	67
Shepley v. Lytle	437	Sluby v. Champlin	214
v. Waterhouse	260	Small v. Proctor	391
Sheppards v. Turpin	178	Smallwood v. Smallwood	223, 238
Sheriff of Norwich v. Bradshaw	141	Smartle v. Williams	390, 452
Sherman v. Transportation Co.	444	Smilie v. Biffle	473
v. Wakeman	231, 236	Smith v. Bond	206
Sherrod v. Bennett	238	v. Bower	318
Sherwood v. Dunbar	127	v. Burtis	377, 390, 436, 481
v. Sutton	184, 186	v. Bythewood	95
Shibla v. Ely	166	v. Calloway	172, 178
Shitler v. Brewer	239	v. Chapin	413
Shoemaker v. Benedict	260	v. Clark	477
Shoenberger v. Adams	74, 487	v. Clay	25

Smith v. Collins	171	Sparhawk v. Bullard	385, 401
v. Dawson	161	Sparks v. Pico	92
v. Dennison	475	Spear v. Ralph	403
v. Dunham	107	Spears v. Hartley	73
v. Eastman	231	Speed v. Burford	344
v. Fly	231	Spencer v. Spencer	62
v. Forty	148	v. Weston	367
v. Fox	137	Spier v. McQueen	327
v. Friel	213	Spong v. Wright	211
v. Garza	414	Spotswood v. Dundridge	178
v. Hill	196	Sprague v. Sprague	115
v. Hosmer	395	Sprecker v. Wakeley	22, 66
v. Kincaid	432	Spring v. Ex'rs of Gray	149, 150, 158,
v. Leeper	231		161
v. Lockwood	86	St. John v. Garrow	229, 269
v. Lorrillard	341, 380, 389	St. Louis v. Gorman	395, 414
v. Ludlow	240, 248, 260	St. Louis Univ. v. McCane	384
v. McCall	369	Stackhouse v. Barnston	87
v. Middletown	392	Stafford v. Richardson	180, 214, 260
v. Mitchell	396	v. Bryan	214, 238, 332
v. Morrow	401	Stamper v. Griffin	406
v. Newby	196, 204, 304	Stanley v. Kempton	107
v. Packard	22	v. Turner	401
v. Poole	271	v. White	391
v. Porter	232	Stansbury v. Taggart	406
v. Reid	304	Staples v. Spring	301
v. Remington	27	Starke v. Starke	174, 197
v. Ricordo	174	Start v. Mellish	198
v. Ruccaster	145	State v. Blackwell	176
v. Simms	240	v. Clark	22
v. Thorn	211	v. Ferguson	142
v. Talbot	183	v. Flemming	37
v. Townsend	275	v. Groome	312
v. Westmoreland	240	v. Hawkins	328
v. Wheeler	475	v. Jennings	285
Snales v. Dale	422	v. Joiner	37
Sneed v. Hanly	181	v. Miller	88, 142
Snode v. Ward	488	v. Pratte	36
Snoddy v. Cage	67	v. Ringold	37
Snodgrass v. Andrews	404	v. Scrope	65
Snook v. Mears	271	State Bank v. Baker	318
Snyder v. Warren	51	v. Byrd	196
Society for Propagating the Gos-		v. Cason	313
pel v. Whitcomb	315	v. Sidwell	206
Soggins v. Heard	166	v. Wooddy	240
Sohn v. Waterson	22	State Bank of Illinois v. Brown	38
Soller v. Croft	174	State of Ala. v. Howard	65
Somerville v. Hamilton	380	Steadman v. Hilliard	401
v. Trueman	406	Steamboat Mary Blane v. Beehler	50
Somes v. Skinner	348	Stearns v. Godfrey	437
Sorber v. Willing	396	v. Page	183, 296
Sotheron v. Hardy	221	v. Stearns	247
Soulden v. Van Rensellaer	269, 290,	Steel v. Henry	468
	319	v. Johnson	407, 414
Souzer v. De Meyer	169, 170	Steele v. Jennings	260
South Sea Co. v. Wymonsdell	186	v. Steele	116
Sowers v. McMillan's Heirs	381	Steigers' Adm'r v. Hillen	367
Spangler v. McDaniel	233	Stephen v. Yandle	178
Spann v. Fox	58	Stephens v. Dewing	390

Stephenson v. Howard	376	T.	
v. Stephenson	95		
Sterndale v. Hawkinson	331		Taberrer v. Brintnall 66, 67, 194, 204
Stetor v. Oram	487		Taft v. Stephenson 265
Stetson v. Veasie	415		Talbott v. Todd 178
v. Winship	375		Tanner v. Smart 209, 211, 220, 235
Stevens v. Hewett	219		Tappan v. Kimball 275
v. Hollister	401		Tarbell v. Parker 196
v. Rowan	197		Tarbuck v. Bispham 274
Stewart v. Brown	420		Tarkington v. Hassell 136
v. Harris	410		Tarver v. Cowart 63
v. Keith	117		Taylor v. Adams 178
v. Martin	113		v. Bates 181
Stickney v. Eaton	149		v. Benham 26, 472
Stile v. Finch	285		v. Buckner 394
Stiles v. Donaldson	156		v. Burnsides 390, 413
Stillwell v. Hasbrouck	287		v. Cox 402
Stockett v. Sascer	221, 247		v. Delancy 21
Stocks v. Van Leonard	183		v. Dawson 471
Stockwell v. Coleman	84		v. Hendrie 247, 269
Stoddard v. Doane	196, 233, 240		v. Horde 386
Stokes v. Berry	380		v. McDonald 145, 147
v. Lebanon	190		v. Parker 147
Stone v. Nichols	107		v. Shield 394
Stopp v. Brown	22, 66		v. Spears 181
Storer, <i>ex parte</i>	150		v. Spicey 247
Story v. Saunders	390		v. Stedman 231
Stowell v. Zouch	359, 480		v. Witman 96
Strange v. Durham	390		Tazewell v. Whittle 232, 265
Straw v. Jones	385, 437		Teigler v. Hunt 120
Strickland v. Walker	231		Temple v. Carsters 50
Strithorst v. Graeme	204		Ten Eyck v. Richards 403
Strong v. Wright	149		v. Waterbury 343
Sturgis v. Crowinshield	22, 194		Thacker v. Gardinier 393
v. Burton	285		Thayer v. Daniels 131
v. Sherwood	55		v. McLellan 390
Succession of Flower	196		v. Mills 216
Summerville v. Holliday	88		v. Munn 73
Sumner v. Sumner	215, 239, 282		The 420 M. Co. v. Bullion M. Co. 394
v. Stevens	404		Theriat v. Hart 21
Sumter v. Morse	145		Thibodeaux v. Levasser 66
Suter v. Sheeler	239		Thomas v. Brinsfield 166
Sutton v. Barrett	235		v. Brock 304
v. Burness	220, 239, 247		v. Croft 130
v. McLoud	404		v. Garvan 433
Swan v. Littlefield	328		v. Green 304
Swaney v. McCulloch	402		v. Hatch 38
Swann v. Sewell	211		v. Robinson 85
Swayn v. Stephens	304		v. Shoemaker 50
Swazey v. Allen	107		Thomasson v. Keaton 234
Swearingen v. Harris	145		Thompkins v. Smith 236
v. United States	89		Thompson v. Alexander 22
Sweat v. Arrington	185		v. Blair 468
Sweet v. Hubbard	219		v. Brown 170
v. Franklin	231		v. Central Bank 142
Swift v. Lanier	95		v. Craig 192, 401
Sydnor v. Palmer	398, 404, 429		v. Fisher 160
Symons v. Blood	394		v. Gaillard 484



xlvi

Vaughan v. Hankinson	244	Ward v. Bartholomew	413
Vaughn v. Bacon	434	v. Cole	200
Veazie v. Penobscot R. R.	136	v. Dulaney	304
v. Williams	190	v. Hallam	201
Vechte v. Brownell	87	v. Herrin	413
Ventris v. Shaw	231	v. Howe	200
Vernon v. Bethel	458	v. Hunter	209, 289
Village Bank v. Arnold	107	v. Kiltz	22
Villard v. Robert	433	v. Reeder	80, 168, 305
Vinal v. Burrill	260	Wardlaw v. Cray	181
Von Hemert v. Porter	204, 231	Ware v. Gowen	200
Voorhies v. Burchard	391	v. Johnson	400
		Warfield v. Lindell	429
W.		Warner v. Daniels	25
Waddle v. Stewart	402	Warren Academy v. Starret	216
Wade <i>qui tam</i> v. Walton	109	v. Childs	390
v. Johnson	484	v. Granville	242
Waggoner v. Hastings	401	v. Hathaway	241
Wagner v. Baird	183	v. Slade	50
Wagstaff v. Smith	87, 178	v. Walker	231, 247
Wainman v. Kynman	240	Washabaugh v. Entriken	391
Wakefield v. Grant	204	Washburn v. Washburn	77
Wakeman v. Barnes	448	Waterhouse v. Martin	378
v. Sherman	236, 269	Waterman v. Haskins	454
Walden v. Bodley	384	Waters v. Earl of Thanet	42, 236
v. Gratz	14, 477	v. Thompsons	238, 241, 279
v. Sherburne	260	v. Tufton	113
Waldron v. Tuttle	401	Watkins v. Harwood	74, 89
Wales v. Smith	404	v. Stevens	289
Walker v. Bank of Miss.	22, 285	Watrous v. Southworth	395
v. Bradley	117	Watson v. Brewster	66
v. Campbell	232	v. Gregg	379
v. Clemens	74	v. Robinson	247
v. Cruikshank	265	v. Tindell	407
v. Dean & Chap. of York	31	v. Watson	477
v. Goodrich	120	Watts v. Griswold	396
v. Lacey	146, 148	v. Devor	260
v. Lathrop	131	Waugh v. Cope	240
v. Walker	167, 178, 183, 471	Way v. Bassett	260
v. Warfield	107	v. Cutting	183, 186
v. Witter	79, 83	v. Sperry	67
v. Wooton	231	Weatherhead v. Bledsoe	37
Wall v. Robson	12	Weatherwax v. Cosumnes	149
Wallingford v. Hearl	372	Weaver v. Weaver	231
Wallace v. Agry	70, 97	Webb v. Fairmaner	48
v. Duffield	390, 470	v. Pell	330
v. Maxwell	396	v. Sturtevant	400
Walls v. McGee	37	Webber v. Pres. &c. Wms. Coll.	215, 247
Walter v. Walter	115	v. Tivill	150, 153, 154
Walton v. Robinson	240	Webbs v. Hynes	391
v. Radcliffe	285	Weber v. Anderson	391
Walworth v. Routh	65	Webster v. Cooper	22
Wamburzee v. Kennedy	463	v. Webster	176
Wanham v. Mohawk Ins. Co.	55	Wedderburne v. Wedderburne	174
Wann v. Pattengale	317	Weeks v. Hall	50
Wanton v. Dale	241	v. Weeks	173
Waples v. Layton	222	Weisinger v. Murphy	404, 430
		Welborn v. Anderson	400

Welford v. Liddle	145, 154, 156	Widdowson v. Harrington	351, 364
Wellborn v. Rogers	174	Wiggins v. Lovering	56
Wellborne v. Weaver	197	Wilcox v. Ex'rs of Plummer	139, 141, 142
Welles v. Russel	234	v. Fitch	12
Wellman in re	53	v. Huggins	326
v. Southard	233	v. Pearman	241
Wells v. Beall	367	Wilde v. Cantillon	441
v. Fish	186	Wilder v. Houghton	448
v. Prince	372, 375	Wiley v. Yule	285
v. Ragland	304, 484	Wilkin v. Wilkin	180
Wenman v. Mohawk Ins. Co.	96, 170, 240	Wilkinson v. Flowers	196, 454
West v. Creditors, &c.	167	v. Nichols	406
v. Fel. R. R. Co. v. Stockett	22	v. Verity	306
v. Rice	142	v. Wilkinson	233
v. Rodahan	471	Wilks v. Robinson	95
v. Sloane	167	Willard v. Clarke	167, 196, 207
Westbrook v. Beverly	231	v. Dorr	32, 33
Weston v. Ames	142	v. Harvey	22
Wetzell v. Bussard	212, 234, 235	Willenheim v. Countess of Carlisle	105
Whaley v. Whaley	384	Willet v. Willett	72
Wharf v. Howell	448	Williams v. Buchanan	391
Wharton v. Marberry	62	v. Burbank	241
Whedbee v. Whedbee	174	v. Burgess	48
Wheeler v. Brewer	207	v. Council, &c.	192, 328
v. Piper	174	v. Durst	467
v. Stone	391	Ex'rs v. Annapolis	438
Wheelock v. Doolittle	247, 260	v. Freeman	170
Whipple v. Blackington	247	v. Gray	435
v. Stevens	240, 260	v. Gridley	241
Whippy v. Hillary	273	v. Griffiths	146, 274
Whitcomb v. Whiting	240, 245, 257, 275	v. Gun	209
White v. Bailey	200, 206	v. Jackson	418
v. Burnley	410	v. Jones	16, 65, 66
v. Hall	248, 258	v. McAlilley	414
v. Jordan	240	v. Mostyne	142
v. Latimer	197	v. Root	285
v. Leavitt	174	v. Smith	208
v. Parkin	77, 79	v. Thomas	390
v. Ward	317	v. Williams	70
v. White	166, 178	Williamson v. Field	22
v. Wilson	197	v. Naylor	232
Whitehead v. Howard	234	v. Wardlaw	323
v. Lord	120	Willis v. Newham	240, 279
v. Walker	97	Willison v. Watkins	174, 386, 404, 429, 437, 444, 468
Whitehouse v. Fellows	186	Wills v. Gibson	115
Whiteside v. Singleton	404	Willson v. Anthony	21
Whiting v. Dewey	433	v. Betts	416, 481
v. White	458	Wilmerding v. Russ	183
Whitmore v. Foose	170	Wilson v. Anthony	25
Whitney v. Bigelow	240, 269	v. Calvert	147
v. Goddard	200	v. Collishaw	432
v. Webb	200	v. Commonwealth	142
Whittaker v. Rice	275	ex parte	452
v. Wisley	53	v. Hudson	37
Whittelsey v. Roberts	204	v. Ivy	183
Wickham v. Freeman	394	v. Keller	204
Wickliffe v. Ensor	413		

## xlix

Wilson v. Kilcannon	481	Worden v. Worthington	292
v. Richards	462	Workman v. Guthrie	196
v. Towle	76	Worthington v. Grimsditch	240
Winburn v. Cochran	304	Wright v. Keithler	22
Winchell v. Bowman	275	v. Oakley	22, 207
v. Hicks	275	v. Swan	37
Windsor v. China	43, 50	Wriscon v. Vize	453
Winston v. McCormick	22	Wyatt v. Hodsdon	240, 260, 275
Winter v. Innes	255	v. Rambo	55
Wintermire v. Westover	22	Wylde v. Porter	249
Wires v. Farr	22, 66	Wylie v. Birch	142
Wisner v. Barrett	168, 170, 178	Wylly v. Collins	178
v. Ogden	294	Wynn v. Lee	204
Witham v. Perkins	375, 429		
Witherow v. Keller	339		
Witherup v. Hill	292		
Witt v. Elmore	55		
Woart v. Winnick	22		
Wolfe v. Whiteman	97		
Wolfensburger v. Young	231		
Wood v. Aikin	197		
v. Braddock	257		
v. Ford	55		
v. Grundy	392		
v. Leland	131, 133		
Woodbridge v. Allen	233, 271		
v. Wright	66		
Woody v. St. Bank	260		
Woodman v. Somerset	82		
Woodruff v. Moore	100		
Woods v. Banks	381, 391		
v. Bliss	406		
v. Dille	405		
v. Houghton	328		
Woodson v. Smith	375		
Woodsworth v. Harley	142		
Woodward v. Clarke	484		
v. Ware	317		
Woodworth v. Spalford	24		





**A TREATISE**  
**ON THE**  
**LIMITATIONS OF ACTIONS.**



# A TREATISE

## ON THE

# LIMITATIONS OF ACTIONS.

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### CHAPTER I.

#### PRESCRIPTION.

1. BY the term "limitation," as here used, is meant the *time* which is prescribed by the authority of the law (*ab auctoritate legis*<sup>1</sup>) during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment; or, the time at the end of which no action at law, or suit in equity, can be maintained. By the Roman law, and by the law of every country of which the Roman or civil law is the acknowledged basis, it appears under the title of "prescription," from the word *prescribo*, which exactly expresses the meaning of the word *limit*, in the sense in which we here consider it.<sup>2</sup>

2. Prescription, therefore, is of two kinds. That is, it is either an instrument of the *acquisition* of property, or an instrument of an *exemption* only from the servitude of judicial process.<sup>3</sup>

3. First: "Prescriptio est titulus ex usu et tempore substantiam capiens ab auctoritate legis."<sup>4</sup> As thus affording the foundation of title, prescription was designated by the Roman jurists "usu

<sup>1</sup> Co. Litt. 118.

<sup>2</sup> Kames's Prin. Equity, 182; Bell's Law of Scotland, 686; and all the well-known codes of, and commentaries upon, the law of France, Holland, Germany, Prussia, and Spain.

<sup>3</sup> Civil Code of Louisiana, Ayliffe, Civil Law, 826. [Prescription is a means of acquisition or of exemption, by a certain lapse of time, and under conditions determined by law. Code Civil, Art. 2219. The statute of limitations affects the remedy merely, while prescription affects the right. Billings v. Hall, 7 Cal. 1.]

<sup>4</sup> Co. Litt. 118.

cipio," from the circumstance that the person who acquired property in this way might be said *usu rem capere*.<sup>1</sup> What was acquired was "adjectio dominii per continuationem temporis lege definiti."<sup>2</sup> In the time of Ulpian, a landlord was deemed to have relinquished his right to his house, if he neglected for several years to exercise acts of ownership.<sup>3</sup> It could not be expected that time, the physical and moral effects of which have for ages been the theme of the historian and the philosopher, and are every day the subject of our contemplation, should not be without its mouldering effect upon the muniments of title. To repair the injuries so committed, long possession, in the eye of the law, is an assurance of title, because it is in itself evidence of title: "Priora præsumuntur à posterioribus."<sup>4</sup>

4. Bracton, and other early writers upon the common law of England, were evidently conversant with the common law, and are free in the use of the term "prescription," especially as applied to incorporeal hereditaments. A title to corporeal hereditaments also, by virtue of prescription, is classed by Blackstone<sup>5</sup> among the methods of acquiring it; as, when a man can show no other title to the land he claims than that he, and those under whom he claims, have immemorially used to enjoy it. English legal writers have, however, generally treated of prescription as applicable to incorporeal rights and easements, or what the civilians treat of as servitudes, such as rights to ways, watercourses, lights, &c.<sup>6</sup> But

<sup>1</sup> Usu capio and Prescriptio differed from each other: 1. In the things acquired; 2. In the time; 3. In the effect. These distinctions were abolished by Justinian, and prescription since comprehends both terms. Halifax, Anal. Rom. Civil Law, 80.

<sup>2</sup> Gro. L. 2, c. 4, p. 81.

<sup>3</sup> Vin. ad Inst. L. 2, T. 6.

<sup>4</sup> The probative force of posterior events, in regard to prior ones, is naturally much stronger than that of prior events with regard to posterior ones. In all human affairs, execution is better evidence of design, than design of execution. The reason, because human designs are so often frustrated. 3 Benth. Jud. Ev. 213, 215, 216. See also Greenl. Law Ev., a work which strongly commends itself to the student and the practical lawyer. Such is the opinion at home and abroad.

<sup>5</sup> Comm.

<sup>6</sup> By the modern rule established in analogy to the limitation of the right of entry upon land, by the statute of limitations of 21 James I., a right to an incorporeal hereditament may be acquired by an adverse uninterrupted enjoyment for twenty years; and the modern Reports, in England and in the United States, abound with decisions to this effect. This doctrine of establishing a prescription, by virtue of twenty years' enjoyment, is now regulated, and made more consistent with previously settled doctrines, in England, by the statute 2 & 3 William IV. c. 21, entitled "An act for shortening the time of prescription in certain cases."

possession, at all events, by the law of England and of this country, or *quasi* possession, as the case may be, is *prima facie* evidence of property, and of a seisin in fee. The longer the continuance of the possession, and the absence of the disturbance of it, the greater is the length to which courts of justice will go in supporting the conclusion that there was a legal origin for it; and, in order to render the title of the possessor complete, they will presume collateral facts, as livery of seisin, execution of deeds, &c., agreeably to the maxim, “*Ex diuturnitate temporis omnia præsuntur solemniter esse acta.*”<sup>1</sup>

5. Legislators, as well as courts, have acted upon such presumptions, and, in the exercise of their peculiar and transcendent functions, have made them positive evidence. The statute of possession of the island of Jamaica is in the nature of the *usu capio* of the Romans, inasmuch as it converts a possession of seven years into an absolute title.<sup>2</sup> So, also, is the modern English statute, of 3 & 4 William IV. c. 27,<sup>3</sup> the thirty-fourth section of which provides that, at the determination of the period limited to any person for making an entry or commencing an action, the title to the land shall be extinguished. So, also, is the statute of possession of the State of Rhode Island, which provides that a quiet possession of twenty years of any lands, tenements, or hereditaments, shall, of itself, make a good and rightful title in fee-simple.<sup>4</sup> No English statute of limitations had this effect before the above statute of William IV.

6. Analogous to the doctrine of prescription, and to the foregoing presumptions of law and the exercise of legislative authority founded upon them, is the ancient doctrine of *finés*, which, in point of antiquity, is not exceeded by the earliest English judicial record.<sup>5</sup> Fines and recoveries were regulated by the statute of

<sup>1</sup> Best on Presumptions of Law and Fact, 87; Mathew on Pre. Ev.; Greenl. on Ev. [But no length of possession of land will in law amount to a presumption of title. It is only a fact to go to the jury with other facts to enable them to determine whether a conveyance has actually taken place. *Callender v. Sherman*, 5 Ired. (N. C.) 711. And even where disabilities, such as coverture or minority, except the case from the operation of the statute, undisturbed possession for thirty or forty years, and the acquiescence of the husband or guardian, is evidence entitled to weight in support of the purchaser's title. *Meanor v. Hamilton*, 27 Penn. St. 187.]

<sup>2</sup> *Beckford v. Wade*, 17 Ves. 88.

<sup>3</sup> Appendix, p. vi.

<sup>4</sup> Appendix, p. xvii.

<sup>5</sup> Instances of them have been produced prior to the Norman invasion. Plowd. 869.

4 Henry VII., and the effect of them was to put a *final end* to all controversies and suits, which it did after five years.<sup>1</sup> The statute of New York allowed five years to claim against a fine, and expressly affirmed the common law, in declaring that a fine levied pursuant to the forms regulated by the statute "shall be a final end, and conclude, as well privies as strangers to the same," excepting persons under disabilities, &c. It operates not merely as a shield to a person in possession under a doubtful title, but as an absolute conveyance, or investment of title, *per se* after five years' acquiescence.<sup>2</sup>

7. Secondly: Prescription may extend to *remedies* only, and be rather the means of exemption from the servitude of an action, than of the acquisition of a positive and absolute title. Where several remedies, therefore, exist in a particular case, a person may be exonerated from one, and still be liable to another. The statute 21 James I. applies only to the remedy. Therefore, if a party has, by this statute, lost his remedy by *ejectment*, he may afterwards have recourse to a remedy of a higher nature, as a *writ of right*. So if he is barred of his real action by the statute of 32 Henry VIII., he may avail himself of a right of entry, which subsequently accrues to him, and maintain an ejectment, if brought within twenty years thereafter, which is the time limited by the before-mentioned statute of James.<sup>3</sup> On the same principle, what the French denominate *fins de non recevoir* by prescription is not considered to extinguish the claim entirely, but only to render it inefficacious, by prohibiting the creditor the enforcing of it.<sup>4</sup> And the limitation of actions for the recovery of money is not generally intended to destroy a just debt, its object being merely to guard against suspicious and ill-founded claims, which have not been pursued before the prescribed time has elapsed; and the right being reserved of showing by a clear and positive admission of the debtor, that the claim is still subsisting, and is still justly due.<sup>5</sup> Therefore, if a debt should be discharged by payment, when the

<sup>1</sup> Cruise on Fines, 1 Ed. IV. 89, 98; *Inman v. Barnes*, 2 Gallison (Cir. Co.), 818.

<sup>2</sup> Per Platt, J., in giving opinion of the court in *Jackson v. Smith*, 18 Johns. (N. Y.) 426. Among the reforms in the English law, brought about by the instrumentality of Lord Brougham, is the abolition of fines and recoveries.

<sup>3</sup> The action of *assumpsit* may not be barred, when to an action for a tort, as *trover*, the cause of action being the same, the statute of limitations may be pleaded. See *post*, § 72.

<sup>4</sup> Evans's Pothier, 402; Code Nap. 618.

<sup>5</sup> Kames's Prin. Eq. 184.

debtor might have availed himself of the statute of limitations, the payment cannot be recalled; for it is such a recognition of the debt as will repel any imputation that the transaction was *nudum pactum*.<sup>1</sup>

8. Prescription has existed in some form, and under some name, as a part of the municipal law of every civilized nation, with the exception of the Jewish. The Jewish law enjoined that all lands, not in the possession of the true owner, should be returned to him at the jubilee.<sup>2</sup> The law of Athens, on the other hand, contained a general prohibition of all actions, where the injury had been committed six years before the complaint was instituted. And by the *Twelve Tables* of Rome, the substance of whose provisions are reputed to have been extracted by the Roman Decemviri from Grecian legislation, the remedies to recover possession of land were limited to the short period of *two* years. In the more advanced stages of the law of the Roman empire, and after it became entitled to the high appellation of *saluberrima lex* we find an “*usucapio longi temporis præscriptio*,” and a “*præscriptio longissimi temporis*.” The former, which related to *movables*, was confined to *three* years. The latter, which was confined to *immovables*, was limited to *ten* years, *inter presentes*, or if the parties were present, and to *twenty* years, *inter absentes*, or if the parties were absent.<sup>3</sup> And through all the modifications which this celebrated law has from time to time received, and in all the varied forms in which it has been administered to the modern nations of continental Europe, some term of time has invariably been observed, as the *ne plus ultra* beyond which a possession cannot be disturbed, and at the end of which a party shall, in all cases, be completely exonerated from all judicial interpellation.<sup>4</sup> The same may be said in relation to Scotland, in which country the civil law has been the model of imitation in respect to the most important subjects, and

<sup>1</sup> *Le Roy v. Crowninshield*, 2 Mason's (Cir. Co.), 170. [By the law of France, if the debtor show clearly that he paid the debt under a mistake as to the fact of his right to prescribe, he may recover it back. Dalloz. *Dict. de Jur. Tit. Prescription Civile*, 11, 39, 40.]

<sup>2</sup> Leviticus xxv. 20, and Wood's Civil Law, 165. By the Hindoo law, no process can be instituted, after three generations, which are reckoned sixty years, to recover possession of land. *Hindoo law from original Sanscrit*, by Colebrook, vol. 8, p. 443.

<sup>3</sup> Cooper's Justinian, L. 2, T. 6; Ayliffe's Civil Law, 822.

<sup>4</sup> Gro. L. 2, c. 4, p. 86; Heinecc. p. 6, § 208; Fred. Code, T. 5, Art. 2; Domat's Civil Law, L. 8, T. 7; Code Nap. Lond. Ed. p. 618; Evans's Pothier, c. 8, Art. 1.

to a great extent. In the year 1469, the government of Scotland established a negative prescription for simple obligations, which became considerably extended by practice, until finally, by the act of 1617, heritable bonds and other heritable rights were included.<sup>1</sup> Demands by book account were subject by the act of 1579 to the limitation of three years, but the limitation of bills and notes was fixed in Scotland not until the 12 Geo. III. to six years.<sup>2</sup>

9. One of the considerations upon which the doctrine of prescription is founded is *public policy*. The spirit of the maxim, "Interest Reipublicæ ut sit finis litium," may be traced to a more remote period than the Christian era. The language of the civilians and of the commentators upon the common law has been, that the dominion of things must not for a long time remain uncertain, so as to disturb the peace of society by giving rise to innumerable and perpetual litigations; and that, to prevent such serious evil, the indolence of those who are dilatory in recovering their property, and claiming what is due them, should be punished, and that those who are indolent shall impute to themselves the punishment.<sup>3</sup> Although, says Domat, there was no other reason to justify the introduction and use of prescription than that of public policy, it would be just to prevent the property of things from being constantly in a state of uncertainty.<sup>4</sup> Judges of courts, both in England and in the United States, have, in very many instances, emphatically characterized statutes of limitation as statutes of *repose*; though it must be admitted, that in too many instances, in both countries, by the astuteness of lawyers, and the too inconsiderate construction of courts, they have been in danger of becoming statutes of controversy.<sup>5</sup> Cause of complaint from this source, as the following pages will illustrate, need no longer, to much extent, be apprehended. With respect to *land*, it may be mentioned, that there is one other public consideration in support of the doctrine of prescription, which is, that during the litigation and investigation of a doubtful title to it, it must become waste and unproductive for the want of improvement and tillage.<sup>6</sup>

<sup>1</sup> Bell's Law Scot. 687, 688, 689.

<sup>2</sup> Ibid. 750.

<sup>3</sup> See Spanish Law of Prescription, in Lapia's edition of Don Josef Febrero de Escribanos, as translated in 10 American Jurist, 268.

<sup>4</sup> Domat's Civil Law, L. 8, T. 7, § 4.

<sup>5</sup> See the observations of Mr. Brougham, on the Reform of the Law, in his speech in the House of Commons, February 7, 1828.

<sup>6</sup> See opinion of the court in *Hoveden v. Lord Annesley*, 2 Sch. & Lefr. 628.



Consequently no legislative action has been more universally sanctioned by the practice of nations and states, and popular approbation, than that exerted for quieting a long, undisputed possession of the soil. The observation, so often advanced as to have become a proverb, that the interests of society require that causes of action should not be deferred an unreasonable time, is peculiarly applicable to land titles in our own country. Nothing, say the Supreme Court of the United States, so much retards the growth or prosperity of a country, as insecurity of titles to real estate; and labor is paralyzed when the enjoyment of its fruits is uncertain.<sup>1</sup> The great public interests are therefore properly respected, and essentially protected by a strict observance of the long-established maxim, “*vigilantibus non dormientibus inservit lex.*”

10. But whatever opinions may have been entertained and advanced to the contrary, it is beyond doubt that prescription, while it conduces, in the manner just mentioned, to the interests of society in general, it at the same time does so as the means of insuring *private justice*. In a controversy respecting property, the party claiming may, it is true, by length of time, be barred of his remedy to recover it, and the present occupant be regarded as the lawful proprietor. In such a case, however, it is not intended that a title shall be created *merely* by virtue of *possession*; but the design is only to exclude all objections to a title which is *prima facie* good, and which, for a long period of time, in the belief of the possessor, has so remained, without having been the subject of any claim or controversy. And the lapse of time is regarded not only as a dereliction of all grounds of objection, but as a protection against the ingenious attempts to frustrate an unexceptionable title, by the intromission of claims, the injustice of which (from the lapse of time) it is extremely difficult to detect and expose.<sup>2</sup> It is unquestionably the natural tendency of *time* to obscure and extinguish the direct evidence of title. Statutes of limitation are intended to cure this defect, and supply the want of such evidence, or, as it was said by Lord Plunkett, chancellor of Ireland, their object is to *repair the injuries committed by time*.<sup>3</sup>

<sup>1</sup> *Lewis v. Marshall*, 5 Peters (U. S.), 470; *Hawkins v. Barney's Lessee*, Id. 457.

<sup>2</sup> A prescription which was introduced into Scotland, in 1617, proceeded on the inconvenience arising from the loss of titles and the danger of forgery, as well as the multitude of lawsuits. *Bell's Law Scot.* 687.

<sup>3</sup> [As to presumption of *payment* from lapse of time, see *post*, § 78.]

11. With regard to demands arising *ex contractu*, it would obviously be the greatest injustice to subject persons against whom a demand of this nature is made of long standing, to discharge it, whether it be well or whether it be ill founded; because it is possible that it may have been already discharged, and the evidence of the discharge may have been lost.<sup>1</sup> It is admitted that a demand of this kind may be very old, and at the same time be very just; but then if it can be sustained, every demand, without any reference to its staleness, may be sustained, which experience has developed would result in falsehood and perjury, and consequently in great injustice.<sup>2</sup> Every one must be sensible of the liability of a debtor to lose his receipts, or whatever other evidence he might, at the time, have had of payment; and it must be manifest that there is much injustice in compelling him to preserve the acquittances which prove the debt to be satisfied, after a reasonable time.<sup>3</sup> In a modern case in England, it was declared by one of the judges, that “long dormant claims have more of *cruelty* than of justice in them, and that Christianity forbids an attempt at enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge.”<sup>4</sup> The very fact of *acquiescence*, or forbearance in him who has refrained to institute his claim, is *in itself* a strong presumption that it was the result of a consciousness on his part that the claim is unfounded, or at least extremely questionable. Presumptions are always founded upon the ordinary course of things, and it is not very usual for a creditor to delay enforcing the payment of what has been for a considerable time due.

<sup>1</sup> Clemenston v. Williams, 8 Cranch (U. S.), 72.

<sup>2</sup> Kames's Prin. Eq. 182.

<sup>3</sup> Evans's Pothier, 404; Hellings v. Shaw, 7 Taunt. 608.

<sup>4</sup> A'Court v. Cross, 8 Bing. 829.

## CHAPTER II.

## LIMITATIONS OF ACTIONS AT LAW.

12. THE history of the limitation of actions at law in this country is, for very obvious causes, intimately connected with that of England. According to Bracton, "Omnes actiones in mundo, infra certa tempora, habent limitationem."<sup>1</sup> Lord Coke, however, thinks that this general position will admit of several exceptions; and he says, that the limitation of actions was by force of divers acts of Parliament;<sup>2</sup> and it seems to be now so understood.<sup>3</sup> There was undoubtedly, at a very remote period in England, a stated time for the heir of the tenant to claim after the death of his ancestor; and, in case of non-claim before the expiration of the time (a year and a day), the claimant was without remedy.<sup>4</sup> The extreme antiquity of the doctrine of fines, and its analogy to some modern acts of limitations, have already been referred to.<sup>5</sup>

13. Certain *remarkable* periods were at first fixed upon. By the statute of Merton, in the time of Henry III., the limitation in a *writ of right*, which was then from the time of Henry I., was reduced to the time of Henry II. Assizes of *mortdauncestor* were reduced from the last return of King John from Ireland, or to the twelfth year of his reign. Assizes of a novel disseisin, "a prima transfretatione regis in Normaniam," which was 5 Hen. III., and which before that time had been "post ultimum reditum Henric. III. de Britannica." By the statutes 1 & 2 Westminster, the writ of right was limited to the first coronation of Richard I.<sup>6</sup>

14. The period established by the last of the above statutes increased every day; and, consequently, as Lord Coke observes, "many suits, troubles, and inconveniences did arise, and therefore a more direct and commodious course was taken, which was to

<sup>1</sup> Bract. Lib. 2; 8 Cruise's Dig. 479.

<sup>2</sup> 2 Inst. 95; Co. Litt. 115; 4 Rep. 10.

<sup>3</sup> People v. Gilbert, 18 Johns. (N. Y.) 227; Wilcox v. Fitch, 20 Id. 475; Wall v. Robson, 2 Nott & M'Cord (S. C.), 499

<sup>4</sup> 5 Bac. Abr. 461; Speln. Gloss. 32.

<sup>5</sup> Ante, § 6.

<sup>6</sup> Hale's Hist. Common Law, 122; Co. Litt. 114; 2 Inst. 94, 95.

endure for ever, and calculated so to impose diligence on, and vigilance in, him that was to bring his action, so that, by one constant law, certain limitations might serve, both for the time present, and for all times to come.”<sup>1</sup> The course was first taken by the statute 32 Hen. VIII., c. 2, in the year 1540,<sup>2</sup> and was followed, between eighty and ninety years afterwards, in 1623, by the more matured and comprehensive statute of 21 James I., c. 16, entitled “An Act for Limitation of Actions, and for avoiding of Suits at Law.”<sup>3</sup> The last statute was generally adopted by the original American States, when they were Colonies; and, whenever it has been since superseded by other acts of limitation, which do not essentially vary from it in respect to land, they are to be construed as that statute, and all other acts of limitation founded on it, have been construed.<sup>4</sup>

15. But the period arrived when the statute of James, in so far as regards real property and the actions for the recovery of it, gave way to the views of a more liberal and enlightened age. The well-known energetic and persevering efforts of Lord Brougham, to reform the anomalies and abuses of the English law, led to a commission, directed to five commissioners, in the year 1828, with instructions “to make diligent and full inquiry into the law of England respecting real property, and the various interests therein; and the methods and forms of alienating, conveying, and of assuring the titles thereto; and whether any and what improvements could be made therein, and how the same might be carried into effect.” One of the most important and beneficial results of this commission was the statute of limitations of 3 & 4 William IV. c. 27, in respect to the possession of land, actions for the recovery of it, &c.<sup>5</sup> After the statute of James, and the abolition of military tenures in the reign of Charles II., the feudal relation of landlord and tenant ceased, an actual disseisin became almost impossible, and the doctrine of descents cast was no longer applicable as a limitation to a right of entry.<sup>6</sup> So that, says a late English writer,<sup>7</sup> whose remarks he makes in connection with the above statute, we follow: “The distinction between rights of entry and

<sup>1</sup> 2 Inst. 95.

<sup>2</sup> Appendix, p. i.

<sup>3</sup> Appendix, p. iii.

<sup>4</sup> *Walden v. Heirs of Gratz*, 1 Wheat. (U. S.) 292.

<sup>5</sup> See the statute in Appendix, p. vi. and Comments, p. xvi.

<sup>6</sup> *Atkins v. Horde*, 1 Burr. 60.

<sup>7</sup> *Gibbon's Lex Temporis*, London, 1835, p. 19.

rights of action was the difference between twenty years from the right accruing and fifty years from the seisin of the ancestor ; between rights of action possessory and *droiturel* was the difference between fifty and sixty years from the ancestor's seisin ; a distinction entirely fanciful and arbitrary, which resulted from retaining the forms of the several remedies, when the substantial differences of the rights had long ceased to exist. The various dates from which the time was reckoned by the two statutes (real actions being limited from a positive possession, but entries from dispossession, a very equivocal circumstance), the disabilities which extended the period for entering, the violent and very unreasonable presumptions against adverse possessions, greatly lessened this distinction. And, in many cases, a right to enter remained, when a right of action was barred ; but, supposing the adverse possession to commence at the moment the actual seisin ceased, and the claimant under no disability, he lost one right in twenty years, a second in fifty, and a third and last in sixty years, although, in an action on either of his rights, he recovered possession of the whole of his land." Such are the reasons given by an English jurist for the abolition of real actions by the above statute, with the exception of dower and *quare impedit*, by the terms of which land is only allowed to be recovered by ejectment.<sup>1</sup>

16. The limitation of actions founded upon *contract* has been for many years an important constituent of commercial law ; yet it was not until the twenty-first year of the reign of James I., by the above-mentioned statute of James, that any limitation to such actions was provided for in England by a positive enactment. Lord Ellenborough, in giving his opinion in *Williams v. Jones*,<sup>2</sup> asserted that, at common law, the plaintiff might have sued at any time, and that there was an unlimited right of suit until restrained by the statute referred to, the third section of which limits the bringing of actions *ex contractu* to six years.

17. As, according to the sentiment of Montesquieu, laws are illustrative of history, and history of the laws, it may not be out of place to cast a glance at the causes of this long delay in England, in prescribing a fixed and certain period as the *ne plus ultra*, beyond which no action upon a simple contract shall be instituted. Leaving the question which has been debated, whether the Saxons

<sup>1</sup> See comments upon this statute, &c., in Appendix, p. xvi.

<sup>2</sup> *Williams v. Jones*, 18 East, 449.

in England were subjected to feudal tenure, it is well enough known that the feudal system, in its most unmitigated form, was firmly fastened upon the English people by the Conqueror. It is as well understood that a more ingenious contrivance, intended to repress the disposition natural to men to engage in mercantile traffic, and to baffle attempts to set in motion the wheels of commercial enterprise, could not easily have been devised. There is no occasion to trace the various gradual changes by which feudal tenure in England was reduced to landed estates absolute and unconditional (otherwise than by fiction of law), and essentially allodial. The desired end, it is plain enough, was achieved by the *genius of commerce*, which gave an importance to personal property, and occasioned the frequency of personal contracts of every description. "It is justified," says a learned writer and highly distinguished jurist, "by experience, that, as soon as the commercial spirit begins to acquire vigor, and to gain the ascendant, in any society, we immediately discover a new genius in its policy."<sup>1</sup> One of the fruits of this new genius in England was the third section of the above-mentioned statute, which prescribes a precise time within which an action for the recovery of a debt, and for the non performance of a contract, shall be commenced.

18. The progress towards maturity of the commercial law of England was moreover retarded by a number of adverse public events other than the establishment and continuation of the feudal polity, which, in a measure, may serve to account for the procrastination exhibited in legislative action in respect to the enforcement of the rights of creditors, and the barring of their remedies by neglect and lapse of time. We refer to the civil wars between the two houses of York and Lancaster, and the struggles in the reign of Henry VIII. in behalf of the doctrines of the Reformation. That reign is, however, distinguished for the first introduction of the bankrupt laws, though the grand career of England, as a commercial state, may not be said to have fairly commenced before the accession of Elizabeth; and the declaration of the statute of James I. c. 3, that the system of granting monopolies — one unfavorable to general commerce — was contrary to the ancient and fundamental laws of the realm, preceded a short period only the salutary regulation by statute of limiting a precise time for the commencement of actions *ex contractu*.

<sup>1</sup> Park on Insurance.

19. It has been suggested, notwithstanding, that the litigation of debts of long continuance was discouraged and restrained in England, practically, before the statute of James. The *wager of law*, which was allowed in the action of debt upon simple contract, it has been urged, furnished this restraint, and accounts, it has been very rationally supposed, for the long postponement of a statute of limitations of personal actions upon contract. The action of *assumpsit* did not come into general use till after Slade's case,<sup>1</sup> which was decided in 44 Eliz. (1603). Before then *debt* was the ordinary remedy in cases of simple contract, and the effects of the apprehension that the debtor would avail himself of his privilege in that action of waging his law, would be, first, that creditors would obtain a specialty, or higher security for their debts, by which the privilege would be excluded; and, secondly, that demands of long standing would be kept out of courts of justice, since, in relation to them, the defendant would have less difficulty in discharging himself by his wager of law.<sup>2</sup>

20. The benefit to the plaintiff of the saving in the statute of James of his being "beyond seas," in connection with that of the savings of the disabilities of infancy, coverture, and imprisonment, was subsequently, by the statute of 4 Anne, c. 16, extended to the absence "beyond seas" of the defendant.

21. The statute of James, in respect to personal actions, was pronounced by Lord Holt to be one of the best of statutes.<sup>3</sup> The true time within which such actions must now be brought in England is mainly regulated by that statute.<sup>4</sup> Where any difference appears between the provisions of that statute in respect to personal actions, and those of the American statutes of limitation, it will be seen, more in words than in substance, the end of all

<sup>1</sup> 4 Co. 91.

<sup>2</sup> See Wilkinson on Limitations, who cites as authority Lord Ch. Baron Gilbert. When an action of *debt* is brought against a man upon a simple contract, and the defendant pleads *nil debet*, and concludes his plea with this formula, "And this he is ready to defend against him the said A. B., and his suit, as the court of our lord the king here shall consider," &c., he is said to wage his law. He is then required to swear he owes the plaintiff nothing, and bring eleven compurgators, who will swear they believe him. This mode of trial is trial by wager of law. It could be had only in actions of debt on simple contract, and action of detinue. In consequence of this right of the defendant, now actions upon simple contract are brought in *assumpsit*; and, instead of bringing detinue, trover has been substituted. See 2 Bouv. Law Dict.; Stephens on Plead. 124, 250; 8 Black. Com. 341.

<sup>3</sup> 7 Mod. 112.

<sup>4</sup> Brown on Actions at Law, 59.



of them being one and the same.<sup>1</sup> If the periods of limitation be different in different countries or states, and in different actions, yet, as the statutes are drawn with slight variations of phrase, and all being *in pari materia*, the object and intention being the same, they require a uniform construction.<sup>2</sup> The American acts of limitations, as they relate to personal actions of every kind, are either an exact transcript of the statute of James, or a revision and modification of it; and that the mere change of phraseology in the revision of a statute before in force will not work an alteration in the law previously declared, unless it indisputably appear that such was the intention of the legislature, has been expressly decided.<sup>3</sup>

22. The statutes of limitation, in this country, not being retrospective, and being applied only to a right of action which is to commence *in futuro*, are not considered as impairing vested rights, or the obligation of contracts. They rather establish that a certain lapse of time shall amount to the evidence of the transfer of property, or of the performance of a contract, than to take away the one, or dispense with the other.<sup>4</sup> In prescribing the evidence which shall be received in its courts, and in giving effect to that evidence, a State is clearly within the limits designated by the Constitution of the United States.<sup>5</sup> Without destroying, therefore, and simply prescribing a period in which a right may be enforced; and withholding merely the remedy, after the lapse of an appointed time, for reasons of private justice and public policy, a statute of limitations, it has been uniformly considered, is no violation of the sacredness of private rights.<sup>6</sup> The difference between the obligation of a contract, and the remedy to enforce it,

<sup>1</sup> So stated by Huger, J., in delivering the opinion of the court in *Cook v. Wood*, 1 M'Cord (S. C.), 141.

<sup>2</sup> Per Abbott, C. J., in *Murray v. E. India Co.*, 5 B. & Ald. 204. And see 8 Gill & Johns. (Md.) 394.

<sup>3</sup> *Taylor v. Delancy*, 2 Caine's Ca. Err. (N. Y.) 143; *Yates's case*, 4 Johns. (N. Y.) 317, 359; *Brown (matter of)*, 21 Wend. (N. Y.) 316; *Theriat v. Hart*, 2 Hill (N. Y.), 380.

<sup>4</sup> *Gospel Society v. Wheeler*, 2 Gallis. (Cir. Co.) 105. A *retrospective* law is one which takes away or impairs vested rights; or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions *already past*. *Id.* Also, see *Calder v. Bull*, 3 Dallas (Penn.), 386; *Bush v. Van Kleeck*, 7 Johns. (N. Y.) 447.

<sup>5</sup> *Id.*, and *Sturges v. Crowninshield*, 4 Wheat. (U. S.) 122.

<sup>6</sup> *Ogden v. Saunders*, 12 Wheat. (U. S.) 349. [*Jones v. Jones*, 18 Ala. 248; *Wintermire v. Westover*, 4 Ker. (N. Y.) 16.]



is that they originate at different times. The obligation to perform is coeval with the making of the contract, and operates anterior to the time of performance. The remedy, on the other hand, cannot be applied to a contract until it is broken; and then it is applied to enforce a pre-existing obligation.<sup>1</sup>

Reasons of *sound policy*, say the Supreme Court of the United States, have led to the adoption of limitation laws, by State legislatures, and their validity cannot be questioned. The time and manner of their operation; the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment. Cases, however, say the court, *may* occur, where the provisions of the law on these subjects may be so unreasonable as to amount to a denial of a right, and to call for the interposition of the court.<sup>2</sup> If the legislature of a State should pass an act by which a *past* right of action shall be barred, and without any allowance of time for the institution thereof *in future*, it would be difficult to reconcile such an act with the express constitutional provisions in favor of the rights of private property.<sup>3</sup> So if in a State where six years, for instance, may be pleaded in bar to an action of assumpsit, a law should pass declaring that contracts already in existence, and not

<sup>1</sup> [Gospel Society, &c., *supra*. The statute of limitations acts only upon the remedy; it does not impair the obligation of the contract, or pay a debt, or produce a presumption of payment, but is merely a statutory bar to a recovery. It is a shield and not a weapon of offence, and so is ineffectual where a party seeks affirmative relief upon allegations of payment. In such case payment in fact must be shown, notwithstanding the statute has barred the right of the other party to recover such payment. Thus, a subscriber to stock, to the amount of \$2,000, who pays \$1,000, and is afterwards sued for five calls of \$200 each, against four of which he successfully defends by pleading the statute of limitations, cannot, by the payment of the fifth call and an alleged presumed payment of the other four, compel the issue of a certificate of stock. To do this there must be proof of the actual payment of the whole amount subscribed. *Johnson v. Albany & Sus. R. R. Co.* 54 N. Y. 416.]

<sup>2</sup> *Jackson v. Lamphire*, 8 Peters (U. S.), 280.

<sup>3</sup> Besides the foregoing authorities, see *Betzhoover v. Yewell*, 1 Gill & Johns. (Md.) 212; *Charlestown Bridge v. Warren Bridge*, 11 Peters (U. S.), 420; *Eckstein v. Shoemaker*, 8 Whart. (Penn.) 15; *Ward v. Kilts*, 12 Wend. (N. Y.) 137; *Van Rensselaer v. Livingston*, Id. 490; *Blackford v. Peltier*, 1 Black. (Ind.) 96; *Frey v. Kirk*, 4 Gill & Johns. (Md.) 509; *Cook v. Wood*, 1 M'Cord (S. C.), 139; *Hawkins v. Barney*, 5 Peters (U. S.), 485; *Gospel Society v. Wheeler*, 2 Gallis. (Cir. Co.) 141; *Call v. Haggard*, 8 Mass. 423.

barred by the statute, should be construed to be within it, such law without doubt would be deemed unconstitutional. In the State of New York, where a right to sue at law before the Revised Statutes took effect, the time within which a suit will be barred depends upon the statute which existed previous to that time; but where the right to commence the suit accrued since that period, the time within which the suit is to be brought must be regulated by the Revised Statutes.<sup>1</sup> In an action of assumpsit in Massachusetts, on a note made by the defendant payable on demand, the defendant relied on the statute, which was pleaded before the Revised Statutes of that State went into operation. The plaintiff sought to avoid the plea by bringing the case within those statutes, c. 20, § 9, which provides that the time of a defendant's absence from the State shall not be taken as any part of the time limited for the commencement of an action. It was held, that the rights of the defendant were fixed before the last statute was passed, and that he could not thereby be deprived of them.<sup>2</sup>

All the cases go to show, that statutes of limitation, as they are usually intended to be applied, can never be considered as being of that class of laws, which are so expressly interdicted by the constitutional and paramount law of our country.<sup>3</sup>

<sup>1</sup> *Van Hook v. Whitlock*, 8 Paige (N. Y.), Ch. 409; *People v. Supervisors of Columbia County*, 10 Wend. (N. Y.) 863; [*Calkins v. Calkins*, 8 Barb. (N. Y.) S. Ct. 805].

<sup>2</sup> *Battles v. Fobes*, 18 Pick. (Mass.) 532; 19 Ib. 578.

<sup>3</sup> *Baker v. Jackson*, 1 Paine (Cir. Co.), 559; *Le Roy v. Crowninshield*, 2 Mason, 169. The terms of 45th section of the Revised Statutes of New York, are explicit that the provisions of the statute shall not apply to "cases where the right of action shall have accrued, or the right of entry shall exist before the time when this chapter takes effect as a law; but the same shall remain subject to the laws now in force." See *Jackson v. Brooks*, 14 Wend. (N. Y.) 649. By § 29 of the Act of Limitations of Vermont — "The provisions of this chapter, which alter or vary the law now in force relative to the limitation of actions, shall not apply to any case where the cause of action accrues before this chapter shall take effect and go into operation; and in all cases where the cause of action accrues before this chapter takes effect, the laws now in force, limiting the time for the commencement of suits thereon, shall continue in operation." It was held in New Hampshire, that an act of the legislature repealing an act of limitations was, with respect to all actions pending at the time of the repeal, which were previously barred, to be retrospective and contrary to the State constitution. *Woart v. Winnick*, 3 N. H. 473. The legislature have no authority, under the constitution, to suspend the operation of a general law in favor of an individual. *Holden v. James*, 11 Mass. 896. [A statute of limitations may well apply to contracts in existence at the time of its passage, provided a reasonable time be allowed before the statute takes effect, or the debt is barred, within which credit-

23. It has, with the full force of truth, been remarked in reference to statute of limitations of Maryland, that "this is not the

ors may bring their actions. *Pierce v. Tobey*, 5 Met. (Mass.) 168; *Patterson v. Gaines*, 6 How. (U. S.) 550; *Pearce v. Paton*, 7 B. Mon. (Ky.) 172; *Sleeth v. Murphy*, 1 Morris (Iowa), 821; *West Fel. R. R. Co. v. Stockett*, 18 S. & M. (Miss.) 375; *Beal v. Nason*, 2 Shep. (Me.) 344; *Bank of Ala. v. Dutton*, 9 How. (U. S.) 522; *Webster v. Cooper*, 14 Ib. 488; *Winston v. McCormick*, 1 Carter (Ind.), 56; *Pritchard v. Spencer*, 2 Ib. 486; *De Cordova v. Galveston*, 4 Texas, 470; *Gilman v. Cutts*, 3 Fost. (N. H.) 376; *Willard v. Harvey*, 4 Ib. 844; *Slater v. Cave*, 3 Ohio (n. s.), 80; *Briscoe v. Auketell*, 28 Miss. (6 Cush.) 861; *State v. Clark*, 7 Ind. 468; *Cox v. Brown*, 6 Jones (N. C.), Law. 100; *Phares v. Walters*, 6 Clark (Iowa), 106; *Kilbourn v. Lockman*, 8 Ib. 380; *Wright v. Keitheler*, 7 Ib. 92; *Martin v. Martin*, 35 Ala. 560; *Holcombe v. Tracy*, 2 Minn. 241; *Smith v. Packard*, 12 Wis. 371; *Fiske v. Briggs*, 6 R. I. 557; *Callaway v. Nolley*, 31 Mo. 393; *Beesley v. Spencer*, 25 Ill. 216; *Howell v. Howell*, 15 Wis. 55; *Elliot v. Lochrane*, 1 Kan. 126; *Root v. Bradley*, Ib. 437; *Nash v. Fletcher*, 44 Miss. 609. And nine months and fifteen days was held a reasonable time in *Marsh v. Burroughs*, U. S. C. Ct. South. Dist. Ga. Nov. 78, 1 Cen. L. J. 125. It has been held, however, in Arkansas that the statute of 1844 does not apply to causes of action which had accrued at the time of its passage. *Calvert v. Lowell*, 5 Eng. (Ark.) 147; *Morse v. McLendon*, Id. 512. So also in Kentucky as to the effect of the Revised Statutes where the right of action had accrued previous to their passage. *Ashbrook v. Quarle's Heirs*, 15 B. Mon. (Ken.) 20. And in Missouri, Ohio, and California. *Ridgley v. Steamboat Reindeer*, 27 Mo. (6 Jones) 442; *McKenney v. McKenney*, 8 Ohio (n. s.), 423; *Scarborough v. Dugan*, 10 Cal. 305. And see also *Didier v. Davidson*, 2 Barb. (N. Y.) Ch. 477; *Williamson v. Field*, 2 Sand. (N. Y.) Ch. 533; *Thompson v. Alexander*, 11 Ill. 54; *Brown v. Wilcox*, 14 S. & M. (Miss.) 127; *Boyd v. Baringer*, 23 Miss. (1 Cush.) 269; *Paddleford v. Dana*, 14 Miss. 517; *Clemens v. Wilkinson*, 10 Id. 97; *Gordon v. Mounts*, 2 Greene (Iowa), 843; *Hinch v. Weatherford*, Id. 244; *Dickerson v. Morrison*, 1 Eng. (Ark.) 264; *Lucas v. Tunstall*, Id. 448. But a statute extending the time of limitation will not revive causes of action already barred upon pre-existing statutes. *Wright v. Oakley*, 5 Met. (Mass.) 400; *Joy v. Thompson*, 1 Doug. (Mich.) 378; *Hawkins v. Campbell*, 1 Eng. (Ark.) 512; *Couch v. McKee*, Id. 484; *Walker v. Bank of Miss.*, 2 Id. 561; *Clarke v. Bank of Miss.*, 5 Id. 512; *Robb v. Harlan*, 7 Barr (Penn.), 292; *Forsyth v. Ripley*, 2 Greene (Iowa), 181; *McKinney v. Springer*, 8 Blackf. (Ind.) 506; *Davis v. Minor*, 1 How. (Miss.) 183; *Stopp v. Brown*, 2 Carter (Ind.), 647; *Wires v. Farr*, 25 Vt. 41; *Right v. Martin*, 11 Ind. 124; *Sprecker v. Wakely*, 11 Wis. 432; *Hill v. Kricke*, Id. 442; *Baldro v. Tolmie*, 1 Oregon, 176; *Garfield v. Bemis*, 2 Allen (Mass.), 445. Nor take away rights acquired by possession. *Knox v. Cleveland*, 13 Wis. 245. Nor will an ordinance of a constitutional convention. *Yancey v. Yancey*, 5 Heisk. (Tenn.) 258. If, however, the cause of action be not already barred, the statute extending the time will apply. *Winston v. McCormick*, 1 Smith (Ind.), 8; *Chandler v. Chandler*, 21 Ark. 95. And see *Royce v. Hardy*, 24 Vt. (1 Deane) 620; *Henry v. Thorpe*, 14 Ala. 103; *Cox v. Davis*, 17 Id. 714; *Coady v. Reins*, 1 Mon. T. 424; *Sohn v. Waterson*, U. S. Sup. Ct. Mar. 1874; 6 Leg. Gaz. 98. In Louisiana it is held that where there is a change in the limitation, the time prior to the change is reckoned according to the law then in force, and the subsequent time according to the

epoch, when that salutary protection, which the legislature has wisely thrown around us, as a safeguard against fraud and oppression, should be frittered away by judicial refinements and subtile exceptions that never entered into the contemplation of its enlightened framers;<sup>1</sup> and it has for many years been a subject of avowed and sincere regret with the most distinguished judges and eminent jurists of the age, that any constructive innovations were ever ingrafted upon acts of limitation.<sup>2</sup> The result of this awakening sense of the importance of adhering more rigidly to the letter and true meaning of these statutes has been a gradual restoration of the more guarded and rational construction which for a period uninterruptedly succeeded the act of limitations of 21 James I. The views generally, indeed invariably, entertained by our State courts of the present day, it will be seen in the reports, are responsive to those expressed as long since as the year 1812, by Mr. Justice Livingston, of the Supreme Court of the United States.” “The court disclaims all right or inclination to put on statutes of limitation, which are found to be among the most beneficial to be found in our books, any other construction than their words import. It is as much a duty to give effect to laws of this description, with which courts, however, sometimes take great liberties, as to any other which the legislature may be disposed to pass. When the will of the legislature is clearly expressed, it ought to be followed, without regard to consequences; and a construction derived from a consideration of its reason and spirit should never be resorted to but where the expressions are so ambiguous as to render such mode of interpretation unavoidable.”<sup>3</sup> “A statute of limitations,” says Mr. Justice Story, “instead of being viewed in an unfavorable light as an unjust and discreditable defence, should have received such support from courts of justice as would have made it, what it was intended emphatically to be, a *statute of repose*.”<sup>4</sup> Mr. Justice

new statute. *Deal v. Patterson*, 12 La. Ann. 728. A repeal of a statute will not revive causes of action which were extinguished under the statute while it was in force. *Bradford v. Strine*, 13 Fla. 898.]

<sup>1</sup> Per Dorsey, J., in delivering the opinion of the court in *Green, Executor v. Johnson et ux.*, 8 Gill & Johns. (Md.) 894.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Fisher v. Harnden*, Paine (Cir. Co.), 61.

<sup>4</sup> *Bell v. Morrison*, 1 Peters (U. S.), 860.

M'Lean, in giving the opinion of the Supreme Court of the United States, in 1830, says: "Of late years, the courts in England and in this country have considered statutes of limitations more favorably than formerly. They rest upon sound policy, and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction, to evade the effect of those statutes."<sup>1</sup>

24. Under the thirty-fourth section of the Judiciary Act of 1789, the acts of limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the courts of the United States; and the same effect is given to them as is given in the State courts.<sup>2</sup> In accordance, besides, to a steady course of decisions for many years, the Federal judiciary feel it an incumbent duty carefully to examine and ascertain if there be a settled construction by the State courts of the statutes of the respective States, where they are exclusively in force; and to abide by and follow such construction, when found to be settled.<sup>3</sup> There is no unwritten or common law of the

<sup>1</sup> M'Cluny v. Silliman, 3 Peters (U. S.), 270. See also Richmond v. Maryland Ins. Co., 8 Cranch (U. S.), 84; Beatty v. Burnes, Id. 98; Bradstreet v. Huntington, 5 Peters (U. S.), 407. As to the corresponding views entertained by the State courts, see post, chap. on New Promises and Acknowledgments. There is a perfect coincidence between the views expressed by courts, both American and English, at the present day, and those expressed by Sir Orlando Bridgman, "one of the most eminent lawyers about the period of the Restoration." In Benyon v. Evelyn, Orl. Bridgman's Judgments, 363 (Anno 1664), he says, in reference to the limitation of actions: "It is better to suffer a particular mischief than a general inconvenience; and such a one must happen if way be given to equitable constructions against the letter of the act, which is that they shall be sued within six years after the cause of action. But it rests not there, but adds, '*and not after*,' which negative words are the strongest that can be in law." Wilk. on Lim. 52. The volume of Bridgman's Reports was printed from the MSS. of Mr. Hargrave, and first appeared in 1823. They embrace the period between 1660 and 1667. Mr. Fonblanque speaks of these reports, of which Mr. Hargrave had lent him the MSS., as far exceeding Carter's in copiousness, depth, and correctness. 2 Treat. on Eq. 172, n. See "Reporter's Chron. Arranged," by Wallace, p. 41; Philadelphia, 1845. [Phillips v. Pope, 10 B. Mon. (Ken.) 163; Dickinson v. McCanney, 5 Geo. 486; Elder v. Bradley, 2 Sneed (Tenn.), 247; McCarthy v. White, 21 Cal. 495; McQueen v. Babcock, 8 Abb. (N. Y.) App. Dec. 129. And see also Bodell v. Janney, § 194, note.]

<sup>2</sup> M'Cluny v. Silliman, 3 Peters (U. S.), 270.

<sup>3</sup> Bank of United States v. Daniels, 12 Peters (U. S.), 82. See also Woodworth v. Spalford, 2 McLean (Cir. Co.), 168; Jasper v. Potter, Id. 579. "We are bound," says Mr. Justice Catron, in giving the opinion of the Supreme Courts of the United

Union. The rule of action is found in the different States, as it may have been adopted and modified by legislation and a course of judicial decisions. The rule of decision must be found in the local law, written or unwritten.<sup>1</sup>

States, "to conform to the decisions of the State courts of New York, in the construction of their acts of limitation." *Harpending v. Dutch Church*, 16 Peters (U. S.), 455; [*Porterfield v. Clark*, 2 How. (U. S.) 76.]

<sup>1</sup> Per Mr. Justice McLean, in *Norman v. Clark*, 2 McLean (Cir. Co.), 572.

## CHAPTER III.

## LIMITATIONS OF SUITS IN EQUITY.

25. It requires but a partial familiarity with the rules and practice of a court of equity to be aware that *laches* and *neglect* have been invariably and decidedly discountenanced in that court; and that it was so from the commencement of its jurisdiction, and before any positive act of the legislature for the limitation of actions at law was promulgated. From the period when proceedings at law were subject to particular limitations, courts of chancery have, with striking uniformity, applied it in similar cases within the sphere of their jurisdiction.<sup>1</sup> Sir Thomas Plummer, Master of the Rolls, after reviewing the cases in which lapse of time had been considered a bar in those courts, stated the effect of them to be, *first*, that they have ever, upon general principles of their own, even when there was no analogous statutable bar, refused relief to stale demands, where the party had slept upon his right; and *secondly*, that, after a bar has been fixed by statute to the legal remedy, the remedy in a court of equity has, in analogous cases, been confined to the same period. He then stated it to be clear, that, had the claim in question before him been the claim of a legal estate in a court of law, the remedy would have been barred by the statute of limitations; and it was therefore clear that, being an equitable claim, the remedy was equally barred in a court of equity.<sup>2</sup>

<sup>1</sup> See *Smith v. Clay*, 8 Bro. Ch. 630; *Bond v. Hopkins*, 1 Sch. & Lefr. 418; *Beckford v. Wade*, 17 Ves. 96; *Cholmondeley v. Clinton*, 2 Jac. & Walk. Ch. 1; *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90.

<sup>2</sup> *Cholmondeley v. Clinton*, *supra*; [*Bowman v. Wathen*, 1 How. (U. S.) 189; *Chapman v. Butler*, 22 Me. 19; *Phillips v. Rogers*, 12 Met. (Mass.) 405; *Cleveland Ins. Co. v. Reed*, 1 Biss. C. C. (U. S.) 180. But when the court perceives that the party complaining has equitable rights, and that the remedy at law might have proved insufficient, or for other good reasons, it will not refuse relief although the claim has been outstanding for a long time. *Ibid.*; *Mason v. Crosby*, 1 Daveis (U. S.), 308; *Lunn v. Johnson*, 8 Ired. (N. C.) Ch. 70. And see also,



26. "Courts of equity," says Lord Redesdale,<sup>1</sup> "are not within the words of the statutes, because the words apply only to particular legal remedies; but they are within the spirit and meaning of the statutes, and have been always so considered." In point of language, he thought it was a mistake to say that courts of equity act merely in *analogy* to the statutes; and in his apprehension they acted in *obedience* to them. That they act in obedience, it has been pronounced by eminent authority<sup>2</sup> to be correct in its application to a particular class of cases, as, for example, in matters of account, to which they directly apply, and seem equally obligatory upon each court. There is a class of cases, however, in respect to which courts of equity act upon the analogy of limitations at law. In illustration of this proposition, the following cases are given in the able work just referred to below: If a legal title would, in ejectment, be barred by twenty years' adverse possession, courts of equity will act upon the like limitation, and apply it to all cases of relief sought upon equitable titles, or claims touching real estate; if the mortgagee has been in possession of the estate mortgaged for twenty years, without acknowledging the existence of the mortgage, it will be presumed that the mortgage is foreclosed, and that he holds by an absolute title; if the mortgagor has been in possession of the mortgaged estate for the like space of time, without acknowledging the mortgage debt, it will be presumed to be paid; if a judgment creditor has lain by for twenty years, without any effort to enforce his judgment, and it has not been acknowledged

Bancroft v. Andrews, 6 Cush. (Mass.) 498; Kimball v. Ives, 17 Vt. 430; s. c. 8 Law Rep. 265. On the other hand, even where claims are not barred by the statute of limitations, a court of equity will refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice between the parties (which, as a court of conscience, it is bound to do), when the original transactions may have become obscure by time and the evidence may be lost. Ferson v. Sanger, 1 Daveis (U. S.), 252; Hunt v. Ellison, 32 Ala. 173; Wilson v. Anthony, 19 Ark. 16; Mason v. Crosby, 1 W. & M. (U. S.) 342; Kerby v. Jacobs, 13 B. Mon. 485; Baker v. Baker, Id. 406; Hamlin v. Mebane, 1 Jones (N. C.), Eq. 18; post, § 171. But if fraud exists, or the delay is satisfactorily accounted for, or such a course would work injustice, the lapse of time, short of the statute of limitations, is no bar. Warner v. Daniels, 1 W. & M. (U. S.) 90. A claim to real property, however, will not be permitted to be barred by a lapse of time shorter than that which would have barred an action of ejectment at law. Dugan v. Gittings, 8 Gill (S. C.), 188.]

<sup>1</sup> Hoveden v. Lord Annesley, 2 Sch. & Lefr. 329.

<sup>2</sup> 2 Story, Eq. Jur. § 1520.



by the debtor within that time, it will be presumed to be satisfied. "Wherever," says Sir Thomas Plummer, "any statute has fixed the periods of limitations, by which the claim, if it had been made in a court of law, would have been barred, the claim has been, by analogy, confined to the same period in a court of equity."<sup>1</sup> It was said by Mr. Justice Catron, in giving the opinion of the Supreme Court of the United States, in 1838, that courts of equity are no more exempt from statutes of limitation than courts of law.<sup>2</sup>

27. As to the application of the rule in those States of this country wherein there was no equitable jurisdiction established when the statute of limitations was passed, we have the following exposition of Parker, C. J., in delivering the opinion of the Supreme Court of Massachusetts: "The statute of limitations may

<sup>1</sup> *Cholmondeley v. Clinton*, 2 Mer. Ch. 173.

<sup>2</sup> *Bank of United States v. Daniels*, 12 Peters (U. S.), 56. See also *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90; *Robinson v. Hook*, 4 Mason (Cir. Co.), 139; *Miller v. M'Intyre*, 6 Peters (U. S.), 61; *Baker v. Biddle*, Bald. (Cir. Co.) 419; *Hawkins v. Barney*, 5 Peters (U. S.), 457; *Coulton v. Waters*, 4 Id. 62; *Boone v. Chiles*, 10 Id. 177; *Elsmendorf v. Taylor*, 10 Wheat. (U. S.) 152; *Bowman (devisees of) v. Walten*, 2 M'Lean (Cir. Co.), 376; *Piatt v. Vattier*, 1 Id. 16; s. c. 9 Peters (U. S.), 416. The statute has no application, *eo nomine*, to a bill in equity, even when that is concurrent with the remedy at law; yet a court of chancery allows it to be pleaded in such case, for the reason that the party should not be allowed to evade its effect by resorting to another forum. *People v. Everest*, 4 Hill (N. Y.), 71, per Cowen, J.; [*Bruen v. Hone*, 2 Barb. (N. Y.) S. C. 586; *McCartee v. Camel*, 1 Barb. (N. Y.) Ch. 455; *Michoud v. Girod*, 4 How. (U. S.) 591; *Taylor v. Benham*, 5 How. (U. S.) 233; *Perkins v. Cartwell*, 4 Har. (Del.) 270; *Manchester v. Matthewson*, 8 R. I. 287; *Dean v. Dean*, 1 Stat. (N. J.) 425; *Vardeman v. Lawson*, 17 Texas, 10. And see post, § 77, n. If the matter in controversy in a court of chancery is of a purely equitable nature, not cognizable in a court of law, the statute of limitations has no application, but the court will apply the doctrine of neglect and lapse of time according to discretion, regulated by precedents and the peculiar circumstances; but when the two courts have concurrent jurisdiction, and also when the aid of equity is invoked on account of special circumstances, such as the need of a discovery, the difficulty of proceeding at law or the like, the statute is as effectual a bar as at law, with the qualification, that in cases of fraud it commences running from the time of the discovery of the fraud. Per Hoffman, V. Ch., *Lawrence v. Trustees, &c.*, 2 Denio (N. Y.), 577. But where a remote grantee of lands filed a bill in chancery to establish a lost deed in his chain of title, and the widow and heirs of this grantee in the lost deed, being made parties defendant, set up, as a defence to the relief sought, the statute of limitations, barring a right of entry and claiming title in themselves, it was held, that this was no answer to the relief sought, — this establishment of a lost deed; and that, in fact, as the defendants claimed under that deed, the proceeding was not adverse to them. *Rockwell v. Servant*, 54 Ill. 251.]

not, in terms, reach suits in equity in England, because it speaks of *actions*, which is a term generally signifying suits at common law. But it should be considered that our statute of limitations was enacted long before there was any remedy by suit in equity, and that the legislative provision covered all the remedies for debt on simple or implied contracts then known in the Commonwealth; specially including actions of account, which was the only remedy by one partner against the other, without an express promise to account. When new remedies were given on particular subjects, for which remedies also at common law existed, though not so convenient, it cannot be supposed the legislature intended a virtual repeal of the statute of limitations, and thus to open the door of litigation on subjects which had slept quietly for years under that statute. Nothing but an express declaration of the legislative will could work so unexpected an effect. The statute, therefore, operates with us *ex vigore suo*, in equity as well as at law, and not by the discretion or courtesy of courts."<sup>1</sup> The truth is, that statutes of limitation, in this country, are very much like that of James, and, at the time when they were passed, the legislature well understood the manner in which courts of equity had previously considered that statute. This knowledge is in itself a strong presumption of an intention, on the part of the legislature, to bind courts of equity as well as courts of law.<sup>2</sup>

28. The want of a court of equity in a State does not affect the exercise of chancery jurisdiction by the Federal courts in such State. The jurisdiction, it has been held, extends alike to all the States, and gives relief where plain and adequate redress cannot be had at law, agreeably to the well-established rule in the English chancery.<sup>3</sup>

<sup>1</sup> *Farnam v. Brooks*, 9 Pick. (Mass.) 242; [*Bradford v. Spyker*, 32 Ala. 134.] See also *M'Crea v. Piermont*, 16 Wend. (N. Y.) 460; *People v. Everest*, 4 Hill (N. Y.), 7; *Humbert v. Trinity Church*, 24 Wend. (N. Y.) 587, and 7 Paige (N. Y.), Ch. 195; *Hayden v. Bucklin*, 9 Id. 512; *Saunders v. Catlin*, 1 Dev. & Bat. (N. C.) 95; *Ridley v. Hetman*, 10 Ohio, 524; *Long v. White*, 5 J. J. Marsh. (Ken.) 231; *Reeves v. Dougherty*, 7 Yerg. (Tenn.) 222; *Tiernan v. Rescariere's Adm'r*, 10 Gill & Johns. (Md.) 218.

<sup>2</sup> *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 168. [This statute is not in terms applicable to proceedings in surrogate's courts; but there is no reason why an action, barred in all other courts, should be sustained in the surrogate's court. *Paff v. Kinney*, 1 Brad. (N. Y.) 1; *Smith v. Remington*, 42 Barb. (N. Y.) 75.

<sup>3</sup> Per Mr. Justice M'Lean, in *Lorman v. Clarke*, 2 M'Lean (Cir. Co.) 573.

29. So strictly are the above rules adhered to in a court of equity, that persons laboring under any of the disabilities specified in the statute will be allowed the same time, and no more, than they would be entitled to in the case of an action at law.<sup>1</sup> The original consideration of a note has nothing to do with the force and effect of the plea; and there is no good reason why the defendant should be obliged to make discoveries, in order to enable the plaintiff to try the experiment, how far they may enable him to defeat the plea at law.<sup>2</sup>

30. There are, however, cases in which courts of equity will interpose to prevent the bar of statutes of limitation, as, for example, if a party has perpetrated a *fraud* which has not been discovered, until the statutable bar may apply to it at law. That the enactment is positive is not allowed to be used against conscience,<sup>3</sup> and an equitable tribunal will supply and administer, within its own jurisdiction, a substitute for an original legal right, of which a party has been fraudulently and unjustly deprived.<sup>4</sup> The case of *Pulteney v. Warren*<sup>5</sup> established the principle that where a party applies to a court of equity, and carries on an unfounded litigation, protracted under circumstances and for a great length of time, which deprives his adversary of his legal rights, a substitute for the legal right of which the party so prosecuting an unfounded claim has deprived his adversary should be supplied and administered. Upon the same principle, a court of equity will give a party interest out of the penalty of a bond, wherever by unfounded litigation the obligor has prevented the obligee from prosecuting his claim, at the time when his legal remedy was available.<sup>6</sup> For such reason, when a party, by unfounded litigation, has prevented an annuitant from receiving his annuity, the court will, in some cases,

<sup>1</sup> Sugden on Vend. 242; *Demarest v. Wynkoop*, 8 Johns. (N. Y.) Ch. 129; [*Perkins v. Cartwell*, 4 Har. (Del.) 270.]

<sup>2</sup> *Lansing v. Star*, 2 Johns. (N. Y.) Ch. 150. When the relief sought in equity is not more comprehensive than that which might have been obtained in an action for money had and received, the complainant is barred, as he would have been at law, by the statute of limitations. *Tiernan v. Rescariere's Administrators*, 10 Gill & Johns. (Md.) 217.

<sup>3</sup> See post, ch. on The Replication of Fraud. *P. 186*

<sup>4</sup> Per Lord Redesdale, in *Bond v. Hopkins*, 2 Sch. & Lefr. 680; and 2 Story on Eq. Jur. p. 906.

<sup>5</sup> *Pulteney v. Warren*, 6 Ves. 78.

<sup>6</sup> *Ibid.*

give interest upon the annuity.<sup>1</sup> In such cases, courts of equity do no more than supply and administer, within their own jurisdiction, a substitute for the original right of the obligee, of which he has been unjustly deprived by the misfeasance of the obligor.<sup>2</sup>

<sup>1</sup> Per Lord Chancellor Cottenham, in *East Ind. Co. v. Campion*, 11 Bligh, 158.

<sup>2</sup> Story on Eq. Jur. § 1816 a; *Grant v. Grant*, 2 Russ. Ch. 598; s. o. 2 Sim. Ch. 840.

## CHAPTER IV.

## LIMITATION OF SUITS IN ADMIRALTY.

31. THE statute of limitations of James has never been considered as pleadable in the English courts of admiralty, in matters of which that court has cognizance, and where the proceedings are according to the rules of admiralty law. And, therefore, for a suit upon a contract *super altum mare*, no prohibition lies upon their refusal of a plea of that statute.<sup>1</sup> But by the 17th section of the statute, 4 Anne, c. 16, it is enacted, "that all suits and actions in the court of admiralty for seamen's wages shall be commenced and sued within six years next after the cause of such suits and actions shall accrue, and not after." A proviso is then added in favor of persons who are infants, &c. And in case of a *defendant* beyond seas, it is enacted, that if any person against whom there shall be any such cause of suit for seamen's wages, and also any of the causes of action in the statute of James, shall be at the time any such cause of suit accrued beyond the seas, then the person entitled to any such suit or action shall be at liberty to sue such person after his return from beyond the seas, within such times as are respectively limited for the bringing of suits by the last-mentioned statute.

32. The principle, that when an English statute has been made, in amendment of the common law of England, it is to be here considered as a part of our common law, has been pronounced inapplicable to the before-mentioned statute of Anne. Thus, Mr. Justice Story thought that that statute was not in amendment of the common law, as it merely prescribed a limitation as to suits in *one particular court*. The colonial courts of common law, he said, might well adopt some English statutes in amendment of the common law, as applicable to the state of the colonies. But the courts of admiralty in the colonies were governed, in their principles and practice, by more general considerations. And the

<sup>1</sup> *Ewer v. Jones*, 6 Mod. 25; *Walker v. The Dean and Chapter of York*, 3 Keb. 866, 892; *Hyde v. Partridge*, 3 Salk. 227.

omission, on the part of Parliament, to restrict them to any period, in relation to entertaining suits, when it did restrict the high court of admiralty, might well be considered, he observed, as equivalent to a declaration that their proceedings ought to remain according to the general course of the admiralty. And he thought if it was shown that the above-mentioned statute of Anne had been in fact adopted in practice by the colonial courts, before the Revolution, it would not follow that it was obligatory upon the admiralty courts, organized under the government of the Union. They derived, he said, their powers and authority from the Constitution and laws of the United States, and had no connection with, or dependence upon, the colonial or vice-admiralty courts; and, as far as he knew, no statute of limitation, not absolutely addressed to a court, has ever been admitted to control its general jurisdiction over suits. He therefore, on these grounds, thought himself authorized to adjudge, that the statute of Anne, limiting suits in admiralty, is not a bar to such suits in the courts of the United States.<sup>1</sup>

It appears singular that the Congress of the United States, in regulating suits for mariners' wages in the admiralty, should have neglected to prescribe a limitation as to the time when such suits shall be brought. And, as the admiralty and maritime jurisdiction in this country is exclusively confined to the courts of the United States, a statute of limitations of a State is not applicable to the admiralty side of these courts, even if so intended. The State laws, it may be added, which prescribe a limitation for actions, are only intended to apply to actions at common law. And in no other cases can State regulations or limitations govern the Federal courts, unless they fall within the principles of universal law, which direct and limit the application of *lex loci*.<sup>2</sup>

33. Courts of admiralty, however, like courts of equity, will not entertain suits upon *stale* demands; and will, upon general principles, assume some limitations.<sup>3</sup> Thus, in a libel for wages, where more than *twelve years* had elapsed between the end of the voyage and the commencement of the suit, Mr. Justice Story held such delay, unexplained, to be decisive against the libellants. "Although," he said, "there is no prescribed limit beyond which,

<sup>1</sup> Willard v. Dorr, 8 Mason (Cir. Co.), 91.

<sup>2</sup> Brown v. Jones, 2 Gallis. (Cir. Co.) 477.

<sup>3</sup> Willard v. Dorr, 8 Mason (Cir. Co.), 95.

in the exercise of admiralty jurisdiction, the courts of the United States may not take cognizance of suits; yet it has been the constant habit of admiralty courts to refuse their aid in favor of old and dormant claims. Like courts of equity, they prescribe a rule to themselves, by analogy to those positively prescribed by courts of common law, beyond which, unless under special circumstances, constituting a just exception, they will not interpose. The repose of the commercial world requires this forbearance; for otherwise demands would perpetually spring up after the evidence to repel them was gone, by the death or dispersion of witnesses, or by the loss of important documents. So that lapse of time and acquiescence of parties constitute material ingredients in every claim, which is sought to be enforced through the instrumentality of tribunals of justice. When there are no positive bars, presumptions are often indulged which are equally fatal to a recovery.<sup>1</sup> According to the exposition of the law upon this subject, at a more late period, courts of admiralty, like courts of equity, govern themselves in the maintenance of suits by the analogies of the common-law limitations; and are not inclined, unless under very strong circumstances, to depart from those limitations. But, independently of any statutable limitations, courts of admiralty will not entertain stale demands.<sup>2</sup>

<sup>1</sup> Willard v. Dorr, 3 Mason (Cir. Co.), 95.

<sup>2</sup> Per Story, J., in case of Brig Sarah, 2 Sumn. (Cir. Co.) 212. See also Pitman v. Hooper, 3 Id. 286; [Jay v. Allen, Sprague, 168.]

## CHAPTER V.

## CLAIMS IN FAVOR OF THE STATE AND OF THE UNITED STATES.

34. THE maxim “nullum tempus occurrit regi” is a very ancient maxim of the common law, and is treated of both by Bracton<sup>1</sup> and Britton.<sup>2</sup> It is also laid down by Sir Robert Brook, in his “Reading” upon the statute of limitations of Hen. VIII.,<sup>3</sup> that the king is not bound by that statute. And it may be laid down, says Mr. Justice Story, as a safe proposition, that no statute of limitations has been held to apply to actions brought by the crown, unless there has been an express provision including it.<sup>4</sup> As elsewhere stated, where a statute is general, and thereby any prerogative, right, title, or interest is divested or taken from the king, the king is not bound, unless the statute is made by express words to extend to him.<sup>5</sup> And accordingly it was ruled in the case of Magdalen College,<sup>6</sup> “that the king has a prerogative, ‘quod nullum tempus occurrit regi,’ and therefore the general acts of limitation, or of plenarty, shall not extend to him.” The same virtual exception, it seems, prevails in Scotland, for the king is expressly mentioned in the Scottish act of prescription of 1617.<sup>7</sup>

35. By the statute of 21 James I. c. 5, it was enacted that a quiet and uninterrupted enjoyment for *sixty years before* the passing of the act, of any estate derived originally from the crown, should bar the crown from any right or suit to recover such estate, under pretence of any defect in the grant and title. This established the rights of such as could then prove sixty years’ possession. The effect of this act grew less every day, and, in order to preserve the principle of it, a new law became necessary, which was the occasion of the statute 9 Geo. III. c. 16. The latter statute extends the time of limitation to the case of the king him-

<sup>1</sup> Bracton, lib. 2, c. 5.

<sup>2</sup> Britton, De Droit Le Roy, c. 18, c. 29.

<sup>3</sup> Brook’s Reading, 67.

<sup>4</sup> United States v. Hoar, 2 Mason (Cir. Co.), 812.

<sup>5</sup> Bac. Abr. Prerogative, E. 5.

<sup>6</sup> 11 Co. 68, 74; s. c. 1 Roll. 151.

<sup>7</sup> Kames’s Principles of Law of Scot. 347.



self, who is thereby disabled from making title (except to liberties and franchises) beyond the space of sixty years, to be reckoned backwards from the time of commencing any suit to recovery of the thing in question. After this statute, therefore, a possession of sixty years will bar even the king, though the established maxim is, that time will not run against him. But the statute of 9 Geo. III., it has been held, though it bars a suit of the king after sixty years, does not give a title.<sup>1</sup>

36. It is sometimes asserted, that the reason of the above maxim is, that the king is always busied for the public good ; and, therefore, has not leisure to assert his right within the time limited to subjects.<sup>2</sup> The true reason, it has been thought, however, is the great public policy of preserving the public rights, revenues, and property from injury and loss by the negligence of public officers.<sup>3</sup> And the prerogative right of the king in relation to acts of limitation in England is, in fact, nothing more than a reservation or exception, introduced for the public benefit, and is equally applicable to all governments.<sup>4</sup> But independently of any doctrine founded on the notion of prerogative, statutes of limitation should be applied according to the rules for the construction of statutes generally. Where the government is not expressly, or by necessary implication, included, it ought to be clear, from the nature of mischiefs to be redressed, or the language used, that the government itself was in the contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon *any* statute. And upon this ground it was held by Mr. Justice Story, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.<sup>5</sup>

37. In this country the doctrine is clearly well settled, that no laches is to be imputed to the government, and against it no time runs so as to bar its rights.<sup>6</sup> And it has been considered that in

<sup>1</sup> *Goodtitle v. Parker*, 11 East, 488.

<sup>2</sup> 1 Black. Com. 247.

<sup>3</sup> Per Mr. Justice Story, in *United States v. Hoar*, *sup.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Per Mr. Justice Story, in *United States v. Hoar*, *sup.* [And this rule applies as well to personal actions against a surety on an official bond, as to entries on land and similar cases, unless the State be expressly named, and her rights thereby waived. *McKeehan v. Com.*, 3 Barr (Penn.), 151. But see *contra*, *State v. Pratte*, 8 Mo. 286.]

<sup>6</sup> *Inhabitants of Stoughton v. Baker*, 4 Mass. 528; *Weatherhead v. Bledsoe*, 2

all *representative* governments, where the people do not and cannot legally act in a body, where their power is delegated to others, and of necessity to be exercised by them, if exercised at all, the reason for this doctrine is, at least, equally cogent here, as in England.<sup>1</sup> In an action on the case in the Supreme Court of the State of New York, against the defendant, as one of the managers of a lottery, for selling tickets contrary to the provisions of the act for that purpose, by reason whereof the amount of the tickets sold by him had been lost, the defendant pleaded not guilty at any time within six years, to which there was a demurrer and joinder. Woodworth, J., who delivered the opinion of the court, considered that when the people of the State succeeded to the rights of the king of Great Britain, and became an independent government, the principle of *nullum tempus*, &c., became incorporated into the jurisprudence of the State; that, on the ground of expediency and public convenience, it was a necessary principle; and that it was important to preserve it as an attribute of sovereignty; and that it was evident that the legislature acted under the conviction that the rights of the people could not be barred, unless by statute, nor even then, unless they were *particularly named*.<sup>2</sup> In a case in Massachusetts, before Chief Justice Parsons, one of the questions arose on an ancient grant, which was under implied limitation. The grant was made in 1634. It was contended that the defendant having been *so long possessed* of the estate, the State had no right to interfere, and could not now secure the benefit of the limitation by any legal remedy. The chief justice observed, that "the limitation is not extinguished by any inattention or neglect in compelling the owner to comply with it, for no laches is to be imputed to the government, and against it no time runs so as to bar its rights."<sup>3</sup>

Overt. (Tenn.) 352; Harlock v. Jackson, 1 Const. (S. C.) 125; Nimmo's Executor v. Commonwealth, 4 Hen. & Munf. (Virg.) 58; [United States v. Williams, 5 McLean, 133; State v. Flemming, 19 Mis. (4 Bennett) 667; Iverson v. Dubose, 27 Ala. 418; Joselyn v. Stone, 28 Miss. (6 Cush.) 758; Troutman v. May, 33 Penn. St. 445; Cary v. Whitney, 48 Me. 516.]

<sup>1</sup> People v. Gilbert, 18 Johns. (N. Y.) 228.

<sup>2</sup> People v. Gilbert, 18 Johns. 228.

<sup>3</sup> Inhabitants of Stoughton v. Baker, 4 Mass. 526. See also Bagley v. Wallace, 16 Serg. & Rawle (Penn.), 245; Commonwealth v. Miltenberger, 7 Watts (Penn.), 450; Parkes v. The State, 7 Missou. 1; State v. Ringold, 2 Har. & Johns. (Md.) 87; Hall v. Glittering, 2 Id. 112; Madison Co. v. Bartlett, Bre. (Ill.) App. 30; Miller (Lessee of) v. Lindsay, 1 M'Lean (Cir. Co.) 33; Parmilee v. McNutt, 1 Smedes. &

38. The privilege of the maxim, *nullum tempus*, &c., has been extended, in England, to the lessees of the crown. Thus, A, having a lease from the crown for ninety years, and having been out of possession for more than twenty years, recovered, notwithstanding, in ejectment; for it was adjudged, that A's possession was that of the king, against whom the want of possession could not be legally objected. But it was otherwise, if the crown granted the reversion, as, in that case, the privilege did not follow the grantee.<sup>1</sup> In Illinois, it was adjudged to extend to the State Bank. By the act creating that institution, it was declared that it should belong to the State of Illinois; and, therefore, a debt due to the bank was due to the State, and consequently not barred by the statute.<sup>2</sup> But it was held in North Carolina, that, though no laches are imputed to the State, yet it is not the case as to those bodies to whom the execution of a public trust is committed; and, therefore, where the county court brought an action of assumpsit

Mar. 179 (High Co. of Errors, Miss.); *Henlock v. Jackson*, 1 Tr. Con. (S. C.) 135. By the Revised Statutes of New York, the same limitations of actions apply to the State as to individuals; but, before their enactment, the presumption of payment in analogy to the statute of limitations was not applicable to demands in the name of the State. *People v. Supervisors of Columbia County*, 10 Wend. (N. Y.) 363. [In Massachusetts, also, the State stands upon the same footing with individuals. Rev. Stat. c. 119, § 12; Id. c. 120, § 20. That no time runs so as to bar the rights of the State, see also *Com. v. Hutchinson*, 10 Barr (Penn.), 466; *Gore v. Lawson*, 6 Leigh (Va.), 258; *State v. Joiner*, 28 Miss. (1 Cush.) 500; *Brimfield v. Carter*, 2 Kelley (Ga.), 143; *Com. v. Johnson*, 6 Barr (Penn.), 186; *Duke v. Thompson*, 16 Ohio, 84; *Hill v. Joselyn*, 18 S. & M. (Miss.) 597; *Walls v. McGee*, 4 Har. (Del.) 108; *Bledsoe v. Doe*, 4 How. (Miss.) 18; *Wilson v. Hudson*, 5 Yerg. (Tenn.) 398; *Wright v. Swan*, 6 Port. (Ala.) 84; *Levasser v. Washburn*, 11 Gratt. (Va.) 572. *Desmoines v. Harker*, 84 Iowa, 84. But this principle has no application where a party seeks to enforce his private rights by a writ of *mandamus* in the name of the State. *Moody v. Flemming*, 4 Ga. 115. But if the State and a party be jointly interested in a security, the statute is no bar to either. *Glover v. Wilson*, 6 Barr (Penn.), 290. In New York, under 1 R. L. 184, § 1, it seems that the State is not barred by an adverse possession of forty years. *The People v. Arnold*, 4 Comst. (N. Y.) 508. But under Stat. 1788, c. 48, and Stat. 1801, c. 187, a suit brought in the name of the people to set aside a patent granting land is barred. *People v. Clarke*, 5 Selden (N. Y.), 849. And in Texas, the State may be barred if the occupant of land be permitted to remain in possession for a period of time fixed by the laws as imparting dominion over it. *Jones v. Borden*, 5 Texas, 410.]

<sup>1</sup> *Lee v. Norris*, Cro. Eliz. 831. [The statute does not run against the grantee of the State while the State has title. *Kennedy v. Townley*, 16 Ala. 239; *Hartley v. Hartley*, 3 Met. (Ky.) 56.

<sup>2</sup> *State Bank of Illinois v. Brown et al.*, 1 Scam. (Ill.) 106; [*Mahone v. Central Bank*, 17 Geo. 111].

against a treasurer of public buildings, the statute was a bar.<sup>1</sup> In Ohio, it was held, that the statute runs against a town or city.<sup>2</sup> What might be the operation of the statute on private persons, in cases where the legal estate remains in the State, with an equitable interest in those persons, was considered by the late Chief Justice Tilghman, of Pennsylvania, a point involving important consequences, and would require great consideration, whenever it should call for a decision.<sup>3</sup>

39. Neither are the statutes of limitation of the States binding upon the rights of the government of the United States.<sup>4</sup> In a writ of error from a judgment of the District Court, in Massachusetts, in the Circuit Court, before Mr. Justice Story, the original action was assumpsit, brought by the United States, for money had and received against the defendant in error, as administrator. The defendant pleaded: 1st. The general statute of limitations of Massachusetts; 2d. The statute limiting suits against executors. To these pleas the defendant demurred. The opinion of the learned judge was as follows: "The statutes of Massachusetts could not originally have contemplated suits by the United States, not because they were in substance enacted before the Federal Constitution was adopted, on which I lay no stress; but because *it was not within the legitimate exercise of the powers of the State legislature*. It is not to be presumed that a State legislature mean to transcend their constitutional powers; and, therefore, however general the words may be, they are always restrained to persons and things over which the jurisdiction of the State may be rightfully exerted. And if a construction could ever be justified, which should include the United States at the same time that it excluded the State, it is not to be presumed that Congress could intend to sanction an usurpation of power by a State, to regulate and control the rights of the United States. The mischiefs, too, of such a construction would be very great. The public rights, revenue,

<sup>1</sup> *Armstrong v. Dalton*, 4 Dev. (N. C.) 568.

<sup>2</sup> *Lessee of Cincinnati v. First Presbyterian Church*, 8 Ohio, 298; [*Kennebunk v. Smith*, 9 Shep. (Me.) 445; *City of Alton v. Ill. Tr. Co.*, 12 Ill. 38; *School Directors v. Georges*, 50 Mo. 194; *Gibson v. Chouteau*, 13 Wall. (U. S.) 62.]

<sup>3</sup> *Johnston v. Irwin*, 3 Serg. & Rawl. (Penn.) 291. [Persons entering upon lands belonging to the State are to be deemed to be mere intruders; yet as against all other persons the entry will be a sufficient seisin to support a writ of right. *Thomas v. Hatch*, 8 Sumner (U. S.), 170.]

<sup>4</sup> *Swearingen v. United States*, 11 Gill & Johns. (Md.) 373.

and property would be subject to the arbitrary limitations of the States ; and the limitations are so various in these States, that the government would hold their rights by a very different tenure in each.”<sup>1</sup> Agreeably to this construction was the following decision : B., a deputy commissary-general of the United States, received from M., a deputy quartermaster-general, the sum of ten thousand dollars, and acknowledged the same by a receipt signed by him, with his official description. The United States, it was held, could treat M. as their agent in the transaction, by making B. their debtor, and, to an action brought against him for money had and received, the statute of limitations is no bar.<sup>2</sup>

40. In a case in the Supreme Court of New York, it was insisted that the rule does not apply to a claim which the United States takes as *transferees* from another, even though they acquired the legal interest. This, the court said, would no doubt be true, if the statute had begun to run against the claim while it was in the hands of the assignor ; but in the case at bar it did not. The demand in question was a promissory note, of which the government of the United States became owner and holder before it became due ; and the statute, therefore, was no defence to the action.<sup>3</sup> But where, before the transfer to the United States of an instrument which was the evidence of debt, the term prescribed by the statute had elapsed, it can require no argument to show that the transfer of such claim to the United States cannot give it any greater validity than it possessed before the transfer.<sup>4</sup>

41. Though the United States is a stockholder in the Bank of the United States, and is so far a party in all suits to which the bank is a party, the doctrine of “*nullum tempus occurrit regi*,” does not apply to exempt the bank from the operation of the statute of limitations ; for it is a settled principle, that, where a sovereign becomes a member of a trading company, he divests himself, with reference to the transactions of the company, of

<sup>1</sup> *United States v. Hoar, supra* [*McNamee v. The United States*, 6 Eng. (Ark.) 148].

<sup>2</sup> *United States v. Burford*, 8 Peters (U. S.), 12.

<sup>3</sup> *United States v. White, et al.*, 2 Hill (N. Y.), 59.

<sup>4</sup> Per Mr. Justice M’Lean, in giving opinion of the court, in *United States v. Burford*, 8 Peters (U. S.), 30.

the prerogatives of sovereignty, and assumes the character of a private citizen.<sup>1</sup>

<sup>1</sup> *Bank of the United States v. McKenzie*, 2 Brockenb. (Cir. Co.) 898. [And so a city may be barred of their right to land, as in the case of removing so much of a building which projects into the street, by more than twenty-one years of open and notorious possession by the owner of the encroaching premises. *City of Cincinnati v. Evans*, 5 Ohio (N. S.), 594; *Lane v. Kennedy*, 18 Ohio (N. S.), 42. Of course a municipality may plead the statute as well as an individual. *County of Lancaster v. Brenthall*, 29 Penn. St. 38.]

## CHAPTER VI.

## OF THE COMPUTATION OF TIME.

42. THE rule of the civil law is that *prescription* only begins to run from the time when the creditor has a full and perfect right to prosecute his demand.<sup>1</sup> The same rule holds, of course, in respect to the legislative *acts of limitation* of Great Britain and of those of the United States. The time limited, in other words, is to be computed from the time at which a right of entry accrues, and from the time at which a creditor is authorized first to commence a suit. If the contract is to pay money at a future period, or upon the happening of a certain event, the statute, it is very clear, is inoperative, until the specified period has elapsed, or the particular event has occurred; or if upon condition, not until the condition has been performed.<sup>2</sup> In general, it may be said that it is a rule in courts of equity, as well as in courts of law, that the cause of action or suit arises when and as soon as the party has a right to apply to the proper tribunals for relief.<sup>3</sup>

43. Herein is presented a question, which, in a given case, might be of much moment; namely, whether in the computation of time under the statute, the day on which the cause of action accrued is to be included or excluded. If there is to be no fraction of a day, the whole day upon which an act is done, or a liability

<sup>1</sup> Evans's Pothier, 404.

<sup>2</sup> 2 Godb. 437; Fenton v. Emblers, 1 W. Bl. 353; Waters v. Earl of Thanet, 2 Gale & Dav. 166; Helps v. Winterbotham, 2 Barn. & Adol. 481; Rhodes v. Smethurst, 4 Me. & W. 42; Freake v. Cranefeldt, 1 Mylne & Craig, Ch. 499; Arnold v. United States, 9 Cranch (U. S.), 104; Miller v. Miller, 7 Pick. (Mass.) 133; Codman v. Rogers, 10 Id. 112; Jacobs v. Graham, 1 Black. (Ind.) 392, and other cases which will be cited in the course of the following chapter.

<sup>3</sup> 2 Story's Eq. Jur. § 1521 a. [The general rule, as stated in the text, is well settled; but the difficulty is to determine *when* the party has a right to apply to the proper tribunals for relief. And this question has, perhaps, given rise to as much litigation as any other arising under the statute of limitations, without, however, affording the means for extracting any general rule. Its solution must depend mainly upon the facts and circumstances in each particular case. Cases illustrative will be found in their appropriate places. As to what constitutes commencement of action, see post, § 812.]



incurred, must either be included in the computation, or it must be entirely excluded.<sup>1</sup> Upon this point the decisions have been contradictory, and a distinction appears to have been taken in the earlier cases, in relation to it, between the common law and the law-merchant. In the view of the latter, the day of the date of a bill of exchange, or of an acceptance, or of a promissory note, is excluded.<sup>2</sup> But by the earlier decisions, in cases of a different nature, the day upon which a liability is incurred is included. It has been said by Lord Mansfield, that the certainty of a rule is of more importance than the reason of it; and the truth of the proposition as applied to the present subject appears plainly enough. It must be left to the reader to deduce a certain rule from the condition of the law upon the subject, as it now stands.

44. The case referred to in most of the subsequent cases, either with or without approbation, is that of *Norris v. Hundred of Gautris*.<sup>3</sup> That was an action on the statute of Hue and Cry, where the robbery was laid and proved to have been on the 9th of October, 13 Jac. I., and it was held that the action brought on the 9th October, 14 Jac. I., was too late. That is, the day of committing the offence is to be included. The words of the act were, "that no person shall take any benefit, &c., except he or they so robbed shall commence his or their suit or action within one year next after such robbery." It was held by Lord Mansfield and the whole court, in *The King v. Adderley*,<sup>4</sup> that by the true construction of the statute, 20 Geo. II., a sheriff is not liable to be called upon to return process unless within six lunar months after the expiration of his office; and the *day* on which he goes out of office is to be reckoned as part of the six months. He cites as authority the cases just mentioned of *Norris v. Hundred of Gautris* and *Bellasis v. Hester*.<sup>5</sup> The statute of 21 James I. c. 19, enacts that a trader lying in prison two months, that is, two lunar months, after an arrest for debt, shall be adjudged a bankrupt; and it was held that the day of the arrest was included. Lawrence, J., was

<sup>1</sup> See observations of the court, in *Sims v. Hampton*, 1 Serg. & Rawle (Penn.), 411; also of the court, in *Windsor v. China*, 4 Greenl. (Me.) 298; also of the Master of the Rolls, in *Lester v. Garland*, 15 Ves. Ch. 248; also of Washington, J., in *Pearpoint v. Graham*, 4 Wash. (Cir. Co.) 232.

<sup>2</sup> Chitty on Bills; Story on Bills.

<sup>3</sup> Hobart's, 139; s. c. 1 Brownl. 156.

<sup>4</sup> *The King v. Adderley*, Doug. 463.

<sup>5</sup> *Bellasis v. Hester*, 1 Lord Raym. 280.



of opinion that it must be so included upon the authority of *The King v. Adderley*, where he said the rule was laid down generally, that, where the computation of time is to be made from an act done, the day on which such an act is done is to be included.<sup>1</sup> In a case where the law required that a month's notice be given of an action, it was held that the month begins with the day on which notice is served; the court saying that the case came expressly within the rule laid down in *The King v. Adderley*.<sup>2</sup>

45. In accordance with the foregoing decisions, and upon the authority of some of them, it was held by the Supreme Court of Massachusetts, that the day on which a payment was made on a note was to be included in the calculation of time, under a plea of the statute of limitations to an action on the note. The note was dated February 16, 1810, payable on demand, and the action was commenced on the 1st of November, 1817. A payment was made and indorsed on the note, on the 1st of November, 1811, so that the time of limitation would begin to run from that time. The question, therefore, was whether a promise made on the 1st of November, 1811, and sued on the 1st of November, 1817, was barred as not having been brought within six years. The court decided it was, and Mr. Justice Jackson, who delivered the opinion of the court, said: "By the statute of limitations it was intended that the plaintiff should have six full years and no more, within which to bring his action. In this case he might have brought his action on the 1st of November, 1811, as upon the new promise then made (supposing that the action had been previously barred by the statute); and if he may also commence on the first day of November, 1817, it would make seven first days of November, in the six prescribed by the statute."<sup>3</sup> He cited as authority, *Norris v. The Hundred of Gautris*, and Doug. 463, *The King v. Adderley*. Mr. Justice Story, also, in giving the opinion of the Supreme Court of the United States, in 1815, considered the general rule then to be, "that where the computation is to be made from *an act* done, the day on which the act is done is to be included."<sup>4</sup>

<sup>1</sup> *Glassington v. Rawlins*, 3 East, 407.

<sup>2</sup> *Castle v. Burditt*, 8 D. & East, 628.

<sup>3</sup> *Presbrey v. Williams*, 15 Mass. 193. See also *Little v. Blunt*, 9 Pick. (Mass.) 488.

<sup>4</sup> *Arnold v. United States*, 9 Cranch (U. S.), 120.

46. But the above rule was made the subject of discussion by the counsel, and by the Master of the Rolls, Sir William Grant, in the case of *Lester v. Garland*.<sup>1</sup> The views taken of it by the latter, at the counsel's suggestion, have had an effect upon subsequent decisions. The following were the general views expressed by the Master of the Rolls upon this subject, in the case referred to: "It is said for the plaintiffs, that upon this subject a general rule has been by decision established, that where the time is to run from the doing of an act (and for the purpose of this question it must extend to the happening of an event), the day is always to be included. Whatever *dicta* there may be to that effect, it is clear the actual decisions cannot be brought under any such general rule. The presentment of a bill of exchange to the sight of the drawee is an act done; and yet it is now settled, that the day upon which it is presented is to be excluded; though it had been ruled otherwise by three judges of the Court of Common Pleas, against the opinion of Treby, C. J. But the law is now clearly settled against that decision. The annuity act (Stat. 17 Geo. III. c. 26) provides, that the twenty days shall run from the execution of the deed. The execution of the deed is undoubtedly an act done; yet, according to the decisions, the day upon which the deed was executed is excluded." The cases chiefly relied on, he said, to the contrary, "are *The King v. Adderley*, where the day on which the sheriff's office expired was held to be included in the six months, after which he is not to be called on to return process. The Court of King's Bench first thought the day excluded, chiefly upon the ground that the act (Stat. 20 Geo. II. c. 37) was made for the ease of sheriffs, and ought to be construed favorably for them, but afterwards determined that it was to be included. The case of *Castle v. Burditt*, where the day on which the notice was given was included in the month that was to elapse before the action could be brought; the case of *Glassington v. Rawlins*, where, contrary to the first opinion of Mr. Justice Lawrence, it was determined that, in the computation of two months, creating an act of bankruptcy, the day of the arrest is to be included; lastly, the cases upon the statute of Hue and Cry, in which the day of the robbery is included in the year which the party robbed has to bring his action against the Hundred, to which might have been added the case of continual claim." "It is not

<sup>1</sup> 15 Ves. Ch. 248.

necessary," says the Master of the Rolls, "to lay down any general rule upon this subject; but, upon technical reasoning, I rather think it would be more easy to maintain that the day of an act done, or an event happening, ought in all cases to be excluded, rather than that it should in all cases be included. Our law rejects fractions of a day more generally than the civil law does. The effect is to render the day a sort of individual point, so that any act done in the compass of it is no more referable to any one than to any other portion of it; and, therefore, the act cannot properly be said to be passed until the day is passed."<sup>1</sup>

47. Upon the cases of *The King v. Adderley*, *Castle v. Burditt*, and *Glassington v. Rawlins*, Mr. Sergeant Palmer said the Master of the Rolls, in the above case, made an observation that applied correctly to all those cases except the first; namely, that the act done, from which the computation is made, inclusive of the day, *is an act to which the party against whom the time runs is privy*; and, as he unquestionably has the benefit of some portion of the day, there is the less hardship in constructively reckoning the whole of it as a part of the time to be allowed him; whereas, in this case, the event was one totally foreign to the party whose time for deliberation was to begin to run from that event. In the case of a notice, said the Master of the Rolls, of an action to be brought, the party necessarily knows the time at which he is served with the notice, and may immediately begin to consider the propriety of preventing the action by tendering anends; and the same observation applied to the cases of the man robbed.<sup>2</sup>

48. In *Pellew v. Hundred of Womford*,<sup>3</sup> the act or event (and Sir William Grant puts an event on the same footing as an act) was a fire; and the day was excluded partly on the principle of the suggestion in *Lester v. Garland*, that the party to be affected was not privy to the occurrence. Bayley, J., in *Hardy v. Ryle*,<sup>4</sup> recognizes that principle, and cites the instance of a notice of action among those in which the day should be included. Where

<sup>1</sup> This case arose out of a condition precedent in a will. It was held that the six months are exclusive of the day of the testator's death; therefore, as he died on the 12th of January, between eight and nine in the evening, a security given on the 12th of July, about nine in the evening, was sufficient. See the reasoning of the Master of the Rolls, in connection with *Mercer v. Ogilvie*, 14 Ves. 554.

<sup>2</sup> Referring to the robbery in *Norris v. Hundred of Gautris*.

<sup>3</sup> 9 B. & Cress. 184.

<sup>4</sup> Ibid. 608.

a contract was made for the sale of goods to be paid for in two months, the Court of Exchequer held that the day of the contract was to be excluded. This, however, is governed by the law-merchant; but the authority of *Castle v. Burditt* was questioned.<sup>1</sup> Under a statute which directs that no attorney shall commence an action for his fees until "the expiration of one month or more after he shall have delivered his bill," the month is to be reckoned exclusively of the day on which the bill is delivered and the action brought.<sup>2</sup> It was held, under a statute which declares that every warrant of attorney to confess a judgment shall be filed "within twenty-one days after the execution of such warrant, that the twenty-one days are to be reckoned exclusively of the day of execution," so that a warrant executed on the 9th December, and filed on the 30th, was in time.<sup>3</sup> Where it appeared, on the face of a conviction for an offence against the excise laws, that the plaintiff had been summoned on the 20th September to appear before the defendant on the 30th September following, and not appearing on that day, the defendant proceeded to hear evidence, and convicted him in a penalty of £5; the court held the conviction to be null and void, and the defendant liable in trespass for issuing a distress warrant, as the excise act (4 & 5 Will. IV., c. 51, s. 19) requires that "ten days' notice at least" shall be given to the party to appear; and the rule is inflexible to construe such limitation of time as ten *clear* days.<sup>4</sup> The day on which a *habere* is to be executed on an eviction under the ejectment statute in Ireland, for non-payment of rent, is to be excluded in the computation of the six months given to the tenant to redeem; and where *a right is to be divested, or a forfeiture incurred*, by including the day of the act done, the computation will make it exclusive.<sup>5</sup>

49. We here offer the views at large of the law upon this subject, of Mr. Justice Washington, as given by him in the case of *Pearpoint, &c. v. Graham*.<sup>6</sup> He said that, after a very laborious examination of all the cases, he thought the following principles

<sup>1</sup> *Webb v. Fairmaner*, 8 Mees. & Welsb. 478.

<sup>2</sup> *Blunt v. Heslop*, 8 Adol. & Ell. 577. Littledale, J.: The words being "one month or more," we must suppose that the client was intended to have a full month after the delivery of the bill.

<sup>3</sup> *Williams v. Burgess*, 12 Adol. & Ell. 685.

<sup>4</sup> *Mitchell v. Forster*, 4 Perry & Dav. (Q. B.) 150; cited in 26 Am. Jurist, 146.

<sup>5</sup> *Dowland v. Foxall*, 1 B. & Beatty, Ch. 192.

<sup>6</sup> *Pearpoint, &c. v. Graham*, 4 Wash. (Cir. Co.) 232.

may be considered as settled: "Where the computation of time is made from *an act done*, the day on which the act is performed is included, because *the act* is the *terminus a quo* the computation is to be made; and there being in contemplation of law no fraction of a day (unless when an inquiry as to the priority of acts done on the same day becomes necessary), the *terminus* is considered as commencing the first moment of that day. Thus is the rule laid down in Clayton's case,<sup>1</sup> and recognized in the cases *Castle v. Burditt*,<sup>2</sup> *The King v. Adderley*,<sup>3</sup> *Bellasis v. Hester*,<sup>4</sup> *Norris v. The Hundred of Gautris*.<sup>5</sup> The only exception to this rule, which is recollected, is established by the law-merchant, which considers the day on which a bill of exchange, made payable at so many days' sight, is excepted, as excluded. Where the expressions are *from the date*, I understand the rule to be, that, if a present interest is to commence from the date, the day of the date is included; but, if they are used merely to *fix a terminus* from which to compute time, the day is in all cases excluded. Thus a lease for so many years, *habendum a datu*, is of the first description, and the day of the date is included. But if the deed had been dated at a day past, and the *habendum* was 'from the date,' the day would be excluded, because no present interest passed, and the expressions were merely used for computing time. So the enrolment of a deed of bargain and sale, under the statute of 27 Hen. VIII., c. 16, which provides that such deeds must be enrolled within six months, excluding the day of the date, is in time (Dy. 218, 6). It is not necessary to refer to other cases as illustrations of the rule, to which I recollect no exceptions. The reason of the rule is perfectly intelligible and sensible. It is that, where words of equivocal meaning (which these are admitted to be) are made use of, and there is no index from the *res gestæ* to show the intention of the party who used them, the construction shall be made most advantageous for him in whose favor the instrument is made. In case of a lease first mentioned, the day of the date is included for the purpose of vesting in the grantee an estate in possession, rather than one in expectancy, which is most beneficial to the grantee. In other cases, the day is excluded for the same reason; as it either prolongs the interest of the grantee, or enlarges the time in which he is required to act. This reason, it must be admitted, does not apply to a bill of exchange made payable so

<sup>1</sup> 5 Rep.<sup>2</sup> *Supra*.<sup>3</sup> *Ibid*.<sup>4</sup> *Ibid*.<sup>5</sup> *Ibid*.

many days after date, where the day is excluded, though to the disadvantage of the person in whose favor it is drawn ; but this case, like that before noticed, depends upon the custom of merchants ; and though it is not within the reason of the rule, it is nevertheless within the rule itself, the date being referred to merely to denote the period from which the time of payment is to be computed.”<sup>1</sup>

50. Chief Justice Tilghman, of the Supreme Court of Pennsylvania, in the case of *Sims v. Hampton*,<sup>2</sup> gave an elaborate opinion upon the same disputed question. He remarked, that the adjudged cases were not to be reconciled ; but came to the conclusion only, upon a careful investigation of them, that the day on which the act is done has been included or excluded, as the nature of the case indicated to the court the propriety of a rigorous or liberal construction. The point decided in the case was, that, in computing the twenty days allowed by the arbitration statute of that State for an appeal, the day on which it is entered is excluded. In *Bigelow v. Wilson*,<sup>3</sup> in the Supreme Court of Massachusetts, the court took a view of the contradictory decisions, and decided that the day on which a deed of an equity of redemption was executed by an officer who sold it was to be excluded, in computing the year within which it was by law redeemable. In *Windsor v. China*,<sup>4</sup> in Maine, the decision was (accompanied with an elaborate opinion) that, in the computation of time from an act done, the day on which the act is done will be excluded ; and, therefore, in the computation of time mentioned in a statute in respect to the notice of the removal of a pauper, the day of giving the notice is to be excluded. It is considered, in Indiana, to be the general rule, that where the computation of time is to be made from an act

<sup>1</sup> The decision in this case was, that the day on which an assignment by a debtor of all his effects was made, is to be excluded. The instrument was for the benefit of such creditors as should release their debts in *sixty days* from the date. If any of the creditors, it was held, release on the *sixty-first* day, the preceding day falling on Sunday, he is too late. He should have released on the *sixtieth*, or on some prior day. [A note dated February 29, 1868, payable in twelve months, is due February 27, 1869, the 28th falling on Sunday ; and an action, under a four years' limitation, brought March 1, 1873, is too late, whether Sunday be or be not taken as a portion of the limited time. *Hibernia Bank v. O'Grady*, 47 Cal. 579.]

<sup>2</sup> *Sims v. Hampton*, 1 Serg. & Rawle (Penn.), 411.

<sup>3</sup> *Bigelow v. Wilson*, 3 Pick. (Mass.) 458.

<sup>4</sup> *Windsor v. China*, 4 Greenl. (Me.) 298.



done, the day on which the act is done is to be excluded.<sup>1</sup> In New York, it was held, in *Fairbanks v. Wood*,<sup>2</sup> that the day on which the Revised Statutes of the State took effect ought to be excluded, in the calculation of the six years. In another case, it was held, that, where the computation of time in a statute is to be from an act done, the first day should be excluded; and this was in reference to a statute prescribing the time within which an appeal should be brought from a justice's court.<sup>3</sup> Chancellor Walworth, in *Vandenberg v. Van Rensselaer*,<sup>4</sup> held that, where a proceeding in a cause is required to be had within a limited time, — as, within a certain number of days from and after the entry of an order, or the service of a notice or other paper, — the whole of the first day is to be excluded. But where a previous notice of a motion, or other proceeding, is required to be given, the whole of the day on which the notice is served is included in the computation of time, and the day upon which the motion is to be made, or other proceeding had, is excluded.<sup>5</sup>

<sup>1</sup> *Jacobs v. Graham*, 1 Blackf. (Ind.) 392.

<sup>2</sup> *Fairbanks v. Wood*, 17 Wend. (N. Y.) 329.

<sup>3</sup> *Dean, Ex parte*, 2 Cowen (N. Y.), 605; [*Lang v. Phillips*, 27 Ala. 311; *Kimm v. Osgood*, 19 Mo. (4 Bennett) 60; *Mengies v. Frick*, 78 Penn. St. 137.]

<sup>4</sup> *Vandenburg v. Van Rensselaer*, 6 Paige (N. Y.), Ch. 147.

<sup>5</sup> See also *Jackson v. Valkenburgh*, where it was held, that, in computing time given by a statute (as for advertising for six months), both the first and last days are never reckoned inclusive. 8 Cowen (N. Y.), 260. [It has been held in a recent case in Missouri, where goods were delivered to a vessel under special contract, that the lien on the vessel attaches on the day of the delivery, and that the day of the delivery of the last parcel should be excluded in estimating the time when the statute of limitations begins to run. *Steamboat Mary Blane v. Beehler*, 12 Mo. 477. And this rule of excluding the day of the act from which a future time is to be ascertained is applicable as well to statutes and proceedings under them, as to contracts, wills, and other instruments. *Weeks v. Hall*, 19 Conn. 376; *Cornell v. Moulton*, 3 Denio (N. Y.), 12; *Warren v. Slade*, 23 Mich. 1. It is impossible to reconcile the decisions either with the rule of inclusion or of exclusion. Whether, in the computation of time, the day on which an act is done or an event happens is to be included or excluded depends upon the circumstances and reason of the thing, so that the intention of the parties may be effected. Such a construction should be given as will operate most to the ease of the party entitled to favor, and by which rights will be secured and forfeitures avoided. This is said to be the rule in *O'Connor v. Towns*, 1 Texas, 107, and, besides being sensible in itself, is probably as accurate a statement of the result of all the cases as can be made. Whether the day of the service of process is to be included or excluded, see *King v. Dowdall*, 2 Sand. (N. Y.) Sup. Ct. 131; *Ditty v. Zeigler*, 1 Greene (Iowa), 164; *Temple v. Carsters*, Id. 492; *Hollis v. François*, 1 Texas, 118; *Vairin v. Edmondson*, 5 Gilm. (Ill.) 270; *Barto v. Abbe*, 16 Ohio, 408. As to notices to quit, see *Aiken v. Appleby*, 1 Morris (Iowa), 8.]

51. When *months* are mentioned in a statute, they are to be considered *lunar*; <sup>1</sup> and it was held, that the six months mentioned in relation to the foreclosure of mortgages in New York are lunar months.<sup>2</sup> In *Snyder v. Warren*,<sup>3</sup> however, words were found in the statute which, in the opinion of the court, showed that *calendar* months were intended. There, one year was mentioned as the time for the defendant to redeem; and then, months being immediately after mentioned, they were construed to mean calendar months. But, in respect to bills of exchange, promissory notes, and other mercantile contracts, a month in all cases means a calendar month, by the law-merchant.<sup>4</sup>

<sup>1</sup> *Parsons v. Chamberlin*, 4 Wend. (N. Y.) 512; [*Rives v. Guthrie*, 1 Jones (N. C.), 84.]

<sup>2</sup> *Loring v. Huling*, 15 Johns. (N. Y.) 120.

<sup>3</sup> *Snyder v. Warren*, 2 Cowen (N. Y.), 518.

<sup>4</sup> *Thomas v. Shoemaker*, 6 Watts & S. (Penn.) 179; 1 Johns. Cases, 200. On the subject of months, we thought we might do a service to the reader by extracting the following from Bouvier's "Law Dictionary," a work which indicates great industry and research on the part of the author, and is highly valuable as a work of reference:—

"Month is a space of time variously computed, as it is applied to astronomical, civil, or solar, or lunar months. The astronomical month contains one twelfth part of the time employed by the sun in going through the zodiac. In law, when a month is mentioned, it is never understood to mean an astronomical month. The civil or solar month is that which agrees with the Gregorian calendar; and these months are known by the names of January, February, March, &c. They are composed of unequal portions of time. There are seven of thirty-one days each, four of thirty, and one which is sometimes composed of twenty-eight days, and, in leap years, of twenty-nine. The lunar month is composed of twenty-eight days only. When a law is passed, or contract made, and the month is expressly stated to be the solar or civil, which is expressed by the term calendar month, or when it is expressed to be a lunar month, no difficulty can arise; but, when time is given for the performance of an act, and the word 'month,' simply, is used, so that the intention of the parties cannot be ascertained, then the question arises, How shall the month be computed? By the law of England, a month means, ordinarily, in common contracts, as in leases, a lunar month; a contract, therefore, made for a lease of land for twelve months, would mean a lease of forty-eight weeks only. 2 Bl. Com. 141; 6 Co. 62; 6 T. 224. A distinction has been made between 'twelve months' and a 'twelvemonth;' the latter has been held to mean a year. 6 Co. 61. Among the Greeks and Romans, the months were lunar; and probably the mode of computation, adopted in the English law, has been adopted from the codes of those countries. *Clef des Lois, Rom. mot Mois*. But, in mercantile contracts, a month simply signifies a calendar month; a promissory note to pay money in twelve months would therefore mean a promise to pay in one year, or twelve calendar months. Chit. on Bills, 406; 1 Johns. Cas. 99; 3 B. & B. 187; 1 M. & S. 111. In general, when a statute speaks of a month, without adding 'calendar,' or other words showing a clear intention, it shall be intended a lunar month. Com. Dig. Ann B.; 4 Wend. 512. See 2 Cowen, 518; Id. 606. In all legal proceedings, as in commitments, pleadings, &c., a month means four



52. When a thing is ordered *by* a particular day, that day, it seems, is excluded; for it is with the view of having the use of it on that day. An illustration given is, that of a coat ordered *by* Sunday, with a view of wearing it to church.<sup>1</sup> And a contract to complete any work *by* a certain time, means that it shall be done *before* that time.

53. *Instant* means *twenty-four hours*; for an instant is not to be considered in law, as in logic, a point of time, and no parcel of time.<sup>2</sup> In New Hampshire, when a computation is to be made from an act done, or from the time of an act done, the day when the act is to be done is to be included;<sup>3</sup> though, in computation

weeks. 3 Burr. 1455; 1 Bl. 450; Doug. 446, 463. In Pennsylvania and Massachusetts, and perhaps some other States (1 Hill. Ab. 118, n.), a month mentioned generally in a statute has been construed to mean, generally, a calendar month. 2 Dall. 302; 4 Id. 143; 4 Mass. 461; 4 Bibb, 105. [So in Virginia, *Brewer v. Harris*, 5 Gratt. (Va.) 285.] In England, in the ecclesiastical law, months are computed by the calendar. 3 Burr. 1455; 1 M. & S. 111. In New York, it is enacted, that when ever the term 'month' or 'months' is or shall be used in any statute, act, deed, verbal or written contract, or any public or private instrument whatever, it shall be considered to mean a calendar, and not a lunar month, unless otherwise expressed. Rev. Stat. part i. ch. 19, tit. 1, § 4. Vide, generally, 2 Sim. & Stu. 476; 2 A. K. Marsh. 245; 3 Johns. Ch. 74; 2 Campb. 294; 1 Esp. 146; 6 T. R. 224; 1 M. & S. 111; 3 East, 407; 4 Moore, 465; 1 Bl. 150; 1 Bing. 307; s. c. 8 Eng. C. L. 328; 1 Str. 652; 6 M. & S. 227; 3 Brod. & B. 187; s. c. 7 Eng. C. L. 404."

<sup>1</sup> *Curia*, in *Rankin v. Woodworth*, 8 Penn. 48.

<sup>2</sup> *Tidd's Pr.* 503, note; *Co. Litt.* 185, b. And see note to the case of *Jackson v. Eddy*, 2 Cowen (N. Y.), 598.

<sup>3</sup> *Blake v. Crowninshield*, 9 N. H. 304. In general the rule has been, that the computation from an act done must *include* the day on which it was done, but that *from* the day of the date of the act *excludes* the day. A distinction has always been taken between cases where the injury, as matter complained of, was done to the plaintiff himself, or in his presence, so that he must know it immediately, on the same day, and cases where the defendant was absent at the time, and might not hear of it till afterwards. 3 Chitty's *Pr.* 109. As to fractions of days, although it is an ancient maxim, that, in law, there is no fraction of a day, yet that fiction no longer prevails, when it becomes essential for the purposes of justice to ascertain the exact hour or minute. Besides the opinion of Washington, J., before cited, in *Pearpoint, &c.*, to this effect, see Chitty, *supra*, 111; note *a* to *Ex parte D'Obree*, 8 Ves. (Sumn. ed.) 83; In the Matter of *Richardson*, 2 Story (Cir. Co.), 571. [*Cornell v. Moulton*, 8 Denio (N. Y.), 12; *Ferris v. Ward*, 4 Gilm. (Ill.) 499; *Whittaker v. Wisley*, 9 Eng. L. & Eq. 45; *Lang v. Phillips*, 27 Ala. 311. But although divisions of a day are allowed to make priorities in questions concerning private acts and transactions, they are never allowed to make priorities in questions concerning public acts, such as legislative acts or public laws, or such judicial proceedings as make matter of record. Per Prentiss, J. In *re Wellman*, 5 Washb. (20 Vt.) 653; s. c. 7 Law, 25, where the whole subject of priorities is re-examined with great learning and ability after the decision In the Matter of *Richardson* and the doctrine in that case denied. But see

of time from a date, or from the day of a date, the day of the date is to be excluded.

*Whittaker v. Wisley, ubi supra.*] As it respects the practice of the Supreme Courts of law in England, it has been fixed by the general rule of all the courts, Hil. T. 2 W. IV. reg. 8 (8 Bing. 307, 308), which ordered that, "in all cases in which any particular number of days, not being expressed to be clear days, is prescribed by the rules and practice of the courts, the same shall be reckoned *exclusively* of the *first* day, and *inclusively* of the last day," unless the last shall happen on Sunday, or on holidays, in which case "the time shall be reckoned exclusively of that day also." Note *b* to *Lester v. Garland, supra*, by Mr. Sumner, in his late valuable edition of Vesey's Reports, Boston, 1844.

## CHAPTER VII.

## WANT OF PERSONS TO SUE AND BE SUED.

54. THE term "cause of action" implies not only a right of action, but also that there is some person in existence who is qualified to institute process. In accordance with the maxim of the civil law, "*Contra non valentem agere non currit præscriptio*,"<sup>1</sup> there must be a person to sue. Where there is no person to sue, no *laches* can be imputed, and applying in such case the statute of limitations would be extreme injustice, and contrary also to the conclusions of reason, that they were in the mind of the legislature in enacting the statute.<sup>2</sup>

55. Upon this subject, the case of *Murray v. The East India Company*,<sup>3</sup> seems to have been regarded as a leading case, and to have been relied on as a precedent, both in England and in the United States. In that case, the action was brought by an administrator, with a will annexed, of goods left unadministered by a former administrator (but might be considered as brought by the first administrator), on several bills of exchange accepted by the defendants, who pleaded that the cause of action did not accrue within six years before the commencement of the action; and the plaintiff replied generally to the contrary. The bills were made payable to Mr. H., and were accepted after his death, being presented through an unauthorized channel, and before any administration was granted. The acceptance of the bills and the day of payment were more than six years before the commencement of the suit, but the granting of the first administration was less than six years before. Thus, the general question of law was, Did the time of limitation prescribed by the statute of James begin to run from the date of the defendants' acceptance, or the day of payment, at which time there was no person in existence who could acquire a right of action

<sup>1</sup> Pothier, *Traité des Obligations*, 645; *Ibid.*, *Traité de Prescrip.*; *Ayraud v. Babin*, 19 Mart. (La.) 47; *Morgan v. Robinson*, 12 Id. 76.

<sup>2</sup> See *Richards v. Maryland Ins. Co.*, 8 Cranch (U. S.), 84.

<sup>3</sup> *Murray v. The East India Co.*, 5 Barn. & Ald. 204.

by the acceptance and non-payment, or from the date of the first administration, whereby a person was brought into existence who might acquire a right of action by the non-payment? The court were of opinion that the time of limitation did not begin to run until the grant of the administration. Independently of authority, they considered that it could not be said that a cause of action existed, unless there be also a person in existence capable of suing; and that the object of the statute was manifest both to limit the time of entry upon land and a suit, to a person *in esse* capable of entering or suing.<sup>1</sup> In a case in equity, a suit for an account of the rents and profits of real estate having become abated by the plaintiff's death, after answer, but before the decree, the plaintiff's personal representatives, more than six years afterwards, filed a bill of *revivor*, to which the personal representatives of the original defendant, who had also died, pleaded the statute of limitations, but did not state in his plea that six years had elapsed since representation had been taken out to the original plaintiff: the plea was overruled. The Master of the Rolls cited as authority *Murray v. East India Company*, which he considered to decide that the statute does not begin to run until administration has been obtained;

<sup>1</sup> The court referred to an old analogous case (*Cary v. Stephenson*, reported in Salkeld, 421), and to Sanford's case (cited in Cro. Jac. 61). The latter arose under the statute of fines, 4 Hen. VII. A term of years was granted in remainder, expectant on another existing term; before the expiration of the first term, the grantee died; at the expiration of the first term, the lessor entered, and levied a fine before administration granted; the five years passed, administration was granted, and resolved, that the administrator should have five years, for none had a right of entry before. *Cary v. Stephenson* was precisely the same as *Murray v. East India Co.* It was an action of *assumpsit* for money had and received, brought against one who had received money belonging to the estate of the intestate, after his death, and before administration granted, the receipt being more than six years before the action, but the grant of the administration within six years. The opinion of the court was, that the time of limitation did not begin to run until the grant of the administration. The suit appeared, however, to have gone off, or the plaintiff to have failed upon a supposed defect in his replication. The opinion of the court, in *Murray v. East India Co.* was, that statutes of limitation, being all *in pari materia*, ought to receive a uniform construction. [By the law of France the statute begins to run on the death of the intestate, without reference to the appointment of an administrator; and it is said that parties having claims against the estate must see to it that an administrator is appointed, so that they may sue if need be. So, if the estate holds claims against third persons, it is no less the duty of creditors to see to the appointment of an administrator, who may sue; and if anybody is to suffer by negligence or delay in this respect, it shall be the creditor and not the third person, who has no power to procure the appointment of an administrator. Code Civil. Art. 2258, 2259. Dalloz. *Dict. de Jur.* Tit. *Prescription Civile*, 622, 623.]

and, in the case before him, the plea did not allege that there were personal representatives of the original plaintiff at any time after his death, until the filing of the bill of *revivor*.<sup>1</sup>

56. In these cases, however, if the statute has once begun to run in the lifetime of the testator or intestate, it does not cease running during the period which may elapse between his death and the time at which a personal representative is constituted and duly qualified. It was so expressly held at law, in England, in *Rhodes v. Smethurst*,<sup>2</sup> and in equity, in *Freake v. Cranefeldt*;<sup>3</sup> in which latter case, the Chancellor said, it would be absurd to hold, that, if the debtor died only one day before the six years were out, the creditor was to have another period of six years within which to enforce his demand. A like decision has been made in South Carolina.<sup>4</sup>

<sup>1</sup> *Perry v. Jenkins*, 1 Mylne & Craig, Ch. 118. The precise point decided in *Murray v. East India Co.*, and with reference to that case, decided in *Sturges v. Sherwood*, 15 Conn. 149. Other American decisions, that there must be an administrator or executor appointed; *Hansford v. Elliott*, 9 Leigh (Virg.), 79; *Ruff's Adm'r v. Bull*, 7 H. & Johns. (Md.) 14; *Fishwick v. Sewell*, 4 Id. 393; *Grubb's Adm'r v. Clayton's Ex'r*, 2 Hayw. (N. C.) 878; *Wanham v. Mohawk Ins. Co.*, 18 Wend. (N. Y.) 267; *Geiger v. Brown*, 4 M'Cord (S. C.), 423; *Witt v. Elmore*, 2 Bail. (S. C.) 596. If a surety pays the debt of his principal, after the death of the latter, and when no letters of administration have been taken out upon his estate, the statute does not begin to run until letters of administration are taken out. *Levering v. Rittinhouse*, 4 Whart. (Penn.) 130; [*King v. Aughtry*, 3 Strob. (S. C.) Eq. 149; *Conyers v. Keenan*, 1 Kelley (Ga.), 379; *Buclin v. Ford*, 5 Barb. (N. Y.) S. C. 393; *Lewis v. Broadwell*, 3 McLean (U. S.), 568; *Polk v. Allen*, 19 Miss. 467; *Wood v. Ford*, 29 Miss. 57; *Briggs v. Thomas*, 32 Vt. (3 Shaw), 176. So adverse possession of personal property dates only from the appointment of an administrator. *Wood v. Ford*, 29 Miss. (7 Cush.) 57. An action brought by one who is appointed, in Massachusetts, administrator of the estate of an inhabitant of another State, within twenty years from the time of the death of such inhabitant, is not barred by the statute of limitations, if the action be commenced within two years after the appointment of such administrator, although a previous administrator had been appointed in the State of which the deceased was an inhabitant, the previously appointed administrator having no right to sue in Massachusetts. *Gallup v. Gallup*, 11 Met. (Mass.) 445. And *Hobart v. Conn. Turnpike Co.*, 15 Conn. 145; and *Lee v. Gauze*, 2 Ired. (N. C.) 44, are to the same effect. If a claim be sold by an order of court, invalid for want of jurisdiction, by an administrator in chief, the statute as against the purchaser does not begin to run until the appointment of a succeeding administrator. *Wyatt v. Rambo*, 29 Ala. 510].

<sup>2</sup> *Rhodes v. Smethurst*, 4 Mees. & Welsb. 42.

<sup>3</sup> *Freake v. Cranefeldt*, 3 Mylne & Craig, Ch. 455.

<sup>4</sup> *M'Cullough v. Speed*, 3 M'Cord (S. C.), 455; [*Frost v. Frost*, 4 Edw. (N. Y.) Ch. 733; *Abbott v. McElroy*, 10 S. & M. (Miss.) 100; *McKinzie v. Hill*, 51 Mo. 803. In Missouri, under the statute requiring actions against administrators to be brought

57. *Murray v. The East India Company* was cited and relied upon by the counsel in the case of *Ferguson v. Fyffe*, in the House of Lords,<sup>1</sup> in which it was determined that, where a creditor of a firm in India died there before his right of action was barred by lapse of time, and his personal representative in Scotland brought an action there against a partner of the firm *twenty-three* years after the creditor's death, the English statute of limitations did not take effect, the action having been brought within six years after English probate or letters of administration were taken out to the deceased creditor. The decision partakes of *lex fori*.<sup>2</sup>

58. In the Superior Court of Georgia, the court held, referring to *Murray v. The East India Company*, that when, during the existence of a *partnership*, one of the partners dies, the statute does not commence running in favor of the surviving partner until there is an administrator on the estate of the deceased partner. The court, in this case, admitted the proposition of the counsel, that, when the statute once begins to run, no subsequent disability will stop it, but denied the fact that any cause or right of action accrued in the lifetime of the intestate against his copartner, there being no pretence of any misunderstanding between them.<sup>3</sup>

59. By the Supreme Court of Missouri, in a case where it appeared that there could have been no final settlement of the estate and interest of an intestate until after the death of his widow, when certain reversionary interests (three slaves) for the first time became available to his administrator, it was determined,

within three years from the time of granting letters, where the cause of action accrues after the granting letters, the action may be brought any time within three years after the cause of action accrues. *Finney v. State*, 9 Mis. 227. And the statute does not apply where the administrator has not given notice that letters of administration have been granted. *Wiggins v. Lovering*, 9 Mo. 262. And a plea of the statute by an administrator should aver that notice has been given. *Ibid*; *Bosworth v. Smith*, 9 R. I. 67. But in *Cawthorne v. Weisinger*, 6 Ala. 714, it was held, that the statute begins to run from the date of the letters testamentary, and not from the date of publication of notice. And the statute continues to run, notwithstanding the death of the administrator. *Popkin v. Hewlett*, 17 Ala. 291; *Mills v. Glover*, 22 Geo. 819. Or his removal from the State. *Lowe v. Jones*, 15 Ala. 545. Where one declines to accept a trusteeship under a will, the statute does not begin to run until the appointment of a trustee by the proper authority. *Dunning v. Ocean Nat. Bk.* 6 Lan. (N. Y.) 296.]

<sup>1</sup> 8 Clark & Finn. 121.

<sup>2</sup> See post, as to *lex fori*, Chap. VIII.

<sup>3</sup> *Gardner, Adm'r v. Cummings, &c., Ex'rs*, Decisions of Supreme Court of Georgia, Part I., containing reports of cases of 1842. [*Spann v. F6x*, 1 Geo. Decis. 1.]

that the statute had not run so as to bar the right of the administrator to sue.<sup>1</sup>

60. Where money is lent by a *feme covert*, having a separate estate, to her husband, the statute does not begin to run against the debt until the death of the husband; for, on account of the unity of husband and wife, the latter cannot sue the former.<sup>2</sup>

61. In *Leasure v. Mahoning Township*, in the Supreme Court of Pennsylvania,<sup>3</sup> the plaintiff having been the supervisor of the said township for the years 1819 and 1821, his accounts were settled by the auditors each year, and a balance was found to be due to the plaintiff, for which the suit was brought, by authority of a special act of assembly, passed the 16th of June, 1836. On the trial, the plaintiff gave in evidence the settlements of his accounts, and then offered in evidence a settlement of them again by the auditors for the year 1831. This was objected to in the court below, on the ground that the auditors of 1831 had no authority to examine or allow the accounts for the years 1819 and 1821, and the court below rejected the offer, and instructed the jury that the statute of limitations was a bar to the plaintiff's recovery. The judgment was reversed, Kennedy, J., who delivered the opinion of the court, observing: "In this" (the instruction that the plaintiff's claim was barred by the statute) "we think the court erred, because the claim of the plaintiff is not embraced by that statute. It does not, and it never was intended that it should, apply to claims for the recovery of which the party entitled thereto could not maintain an action. The statute does not extinguish the debt or claim; it only forms a bar to the remedy of the party to recover it by action; but it is perfectly clear that, if the right to maintain an action for it were never vested in him, the statute can be no bar to it, because it would be contrary to reason to hold that the statute operated upon and took that away which never existed, or, in other words, deprived the party of a right which he never had, until the act of 1836 was passed for the special purpose of investing him with such right. Since he has

<sup>1</sup> *M'Nair v. Dodge*, 7 Mo. 404.

<sup>2</sup> *Towers v. Hugner*, 8 Whart. (Penn.) 48. [And where an administrator had returned his account, and divided the estate in good faith, it was held that the statute of limitations began to run, from the time of the division, against all the distributees except one, who was a *feme covert*. *Payne v. Harris*, 8 Strob. (S. C.) Eq. 89.]

<sup>3</sup> *Leasure v. Mahoning Township*, 8 Watts (Penn.), 55.



thus been enabled to bring and maintain his action, no time appears to have been lost on his part, nor room left for the statute to intervene."

62. *There must not only be a person to sue, but a person to be sued.* In the case of *Montgomery v. Hernandez & Co.*, in the Supreme Court of the United States,<sup>1</sup> the plaintiff in error was sued in the court below as surety for the marshal of the district of Louisiana, who, by order of the district court, had sold a vessel and cargo, libelled by the defendants in error, which vessel and cargo, or the proceeds thereof, were, by the final decree of the court of admiralty, ordered to be restored to the libellants. The decree was appealed to the Supreme Court of the United States, and there affirmed; but the marshal had failed to pay over part of the proceeds. The opinion of the court was, that *Hernandez & Co.* had no right to demand of the marshal the proceeds of the sales, or to sue for the recovery thereof, until after the affirmance of that court; that the right of action was suspended during the pendency of the appeal in that court, and, during such suspension, the statute did not run against him.<sup>2</sup>

63. As a general rule, when a temporary incapacity to sue grows out of some particular provision of a statute, the time during which such temporary disability continues should be excluded from the computation. The statute limiting actions against executors and administrators in Massachusetts does not begin to run against persons who have a right to appeal from the decree granting administration, until their right of appeal is lost, or the decree becomes absolute. Such was the construction given to the acts of limitation of that State of 1788, c. 66, and of 1791, c. 28, by Mr. Justice Story. The consequence of a different construction, in the opinion of the learned judge, was, that the right of all parties might, if one might use the expression, be in a state of suspended animation, and yet a bar be all the while running, which they could not avert. It appeared to him, that the proper exposition was, that the bar let in by the probate of the will, and administration granted thereon, was suspended by the appeal; and that it revived

<sup>1</sup> *Montgomery v. Hernandez & Co.*, in Error, 12 Wheat. (U. S.) 129.

<sup>2</sup> And see *Hernandez v. Montgomery*, 2 Mart. (La. n. s.) 422. [*Cornwell v. Morris*, 5 Harr. (Del.) 299. The claim of an executor or administrator against the estate is not barred, as neither can sue himself. *Spencer v. Spencer*, 4 Md. Ch. 368; *Brown v. Stewart*, Ibid. 456. But see *Hick's Appeal*, 21 Penn. 280; *Wharton v. Marberry*, 3 Sneed (Tenn.), 603; *Sims v. Sims*, 80 Miss. (1 George) 333.]



again only when the administration was again put in motion by the determination of the appellate court.<sup>1</sup> In Mississippi, it has been held, that the act allowing nine months, after publication of the grant of letters of administration, before suit can be brought against them, has the effect to suspend the general act of limitations during that period, and thereby to leave the holder of a promissory note six years within which to sue, besides the nine months within which he is restrained from suing.<sup>2</sup>

<sup>1</sup> *Trecothic v. Austin*, 4 Mason (Cir. Co.), 16.

<sup>2</sup> *Dowell v. Webber*, 2 Smedes & Mar. (Miss.) 452. [*Abbott v. McElroy*, 10 S. & M. (Miss.) 100; *Tarver v. Cowart*, 5 Ga. 66; *Lawton v. Bowman*, 2 Strob. (S. C.) 190; *Lewis v. Broadwell*, 3 McLean (U. S.), 568. In New York, eighteen months after the death of the decedent are by statute deducted from the running time. 2 R. S. p. 448, § 8. If, by the provisions of a statute, the debtor cannot be sued, the statute of limitations ceases to run against the creditors. *Planters' Bank v. Bank of Alexandria*, 10 G. & J. (Md.) 446. 'Trover against a thief lies until the expiration of the statutory limitation after the termination of the prosecution, as, before that time, he cannot be sued. *Hutchinson v. Bank of Wheeling*, 41 Penn. St. 42. And see post, § 196, note.]

## CHAPTER VIII.

## LEX LOCI ET LEX FORI.

64. It is a principle of public law, perfectly beyond the reach of judicial controversy, that personal contracts are to have the same validity, interpretation, and obligatory force, in every other country, which they have in the country where they are made or are to be executed. "The convenience and the necessities," says Mr. Justice Story, "of the civilized and commercial world render it indispensable that this principle should be adopted in the earliest national intercourse; and it would not be easy to trace a period when it was not tacitly adopted as a pledge of public as well as private confidence. An exception, coeval with the rule itself, and resting on the same foundation, is, that no nation is bound to enforce or hold valid any contract which is injurious to its own rights or those of its citizens, or which offends public morals, or violates the public faith."<sup>1</sup>

65. Another rule, as is laid down by the same authority, equally well settled, is, that *remedies* on contracts are to be regarded and pursued according to the *law of the place where the action is instituted*, and not by the *law of the place where the contract is made*; <sup>2</sup> and hence the common law is, in respect to statutes of limitation, that the time of limitation of actions upon contract depends on the law of the kingdom or state in which the action is brought (*lex fori*), and not on the law of the kingdom or state where the contract is made (*lex loci contractus*). "Several questions," says a learned Scotch writer, "arise from the different prescriptions established in different countries. In our decisions upon this head, the case is commonly stated as if the question were, whether a foreign prescription, or that of our own country, ought to be the criterion. This should never be made a question; for our own

<sup>1</sup> *Le Roy v. Crowninshield*, 2 Mason (Cir. Co.), 157. Also, see *Bulger v. Roche*, 11 Pick. (Mass.) 36. [*Ruckmaboge v. Motticund*, 32 Eng. L. & Eq. 84.]

<sup>2</sup> *Ibid.* and Story on Conflict of Laws, 482. [*State v. Swope*, 7 Ind. 91; *Garraway v. Hopkins*, 1 Head (Tenn.), 588; *Flowers v. Foreman*, 23 How. (U. S.) 132; *Walworth v. Routh*, 14 La. Ann. 205; *Putnam v. Dike*, 13 Gray (Mass.), 585.]

prescription must be the rule, in every case that falls under it, and not the prescription of any other country.”<sup>1</sup> By the comity existing between nations, foreigners, it is very clear, can pretend to no claim to molest any other independent community than their own, in contesting stale and doubtful claims; and with as little propriety can they claim, in such community, the remedies, and the times and modes of enforcing them, established by the policy of their own government.<sup>2</sup> Such being the doctrine, the respective States under our general government may, in virtue of their reserved sovereignty, limit the time for remedies even upon the judgments of courts of other States, and altogether bar, by statute, suits upon such judgments, if not instituted within the time prescribed by the statute.<sup>3</sup> The first English authority, that statutes of limitation go *ad litis ordinationem* and not *ad litis decisionem*, is a case in equity, in 1705, where, to a bill of discovery of assets, and satisfaction of the plaintiff’s debt, which was a judgment obtained in France, the English statute of limitation was pleaded, and was allowed by the Lord Keeper; and, upon a rehearing, the decree was confirmed.<sup>4</sup> The question was afterwards made at law before Lord Ellenborough, who, in pronouncing judgment, and adverting to the argument, said: “It is said that parties who have contracted abroad return to this country with the same rights only which they had in the country where they so contracted; and, generally speaking, that is so, that is, if the rights of the contracting parties be extinguished by the foreign law by the happening of certain events. But here there is only an extinction of the *remedy* in the foreign court according to the law stated to be received there, but no extinction of the right; and there is no law or authority, that where there is an extinction of the remedy only in the foreign court that shall operate by comity as an extinction of the remedy here also. If it go to the extinction of the right itself, the case may be different.”<sup>5</sup> The case, however, finally turned

<sup>1</sup> Principles of Equity, by Lord Kames, vol. 2, p. 353.

<sup>2</sup> Enlightened and eminent jurists, and celebrated publicists, as Grotius, Puffendorff, and Wolfius, have maintained that the law of prescription is founded in morals, and was derived from the law of nature; that it is a thing of policy, growing out of the experience of its necessity, is universally admitted.

<sup>3</sup> *M’Elmoyle v. Cohen*, 13 Peters (U. S.), 312. [*State of Ala. v. Howard*, 9 How. (U. S.) 522; *Randolph v. King*, 2 Bond (C. C. U. S.), 104.]

<sup>4</sup> *Dupleix v. De Roven*, 2 Vern. Ch. 540, 541; Raithby’s note (8).

<sup>5</sup> *Williams v. Jones*, 15 East, 439.

upon another point; namely, that it was within the saving of the statute of limitations. But the general doctrine, as stated by Lord Ellenborough, is fully recognized by all the other judges; and this and the preceding case, as to the general doctrine, have never since been departed from in England.<sup>1</sup>

66. One of the earliest cases in this country upon the subject is *Nash v. Tupper*, in the State of New York,<sup>2</sup> where, to an action on a note, the plea of the statute of limitations of *six* years of New York was pleaded, and the plaintiff replied, that the contract was made in Connecticut, where the limitation was *seventeen* years. Upon the demurrer to this replication, the court held it bad, and the plea in bar good. In this case, it will be observed that the limitation fixed by the law of the place where the contract was made had not expired. So, in an appeal from the Court of Sessions, in Scotland, to the House of Lords, one of the points decided was, that a solicitor in London suing a debtor in Scotland for costs of conducting an appeal in England, was a case in which the *triennial* prescription of the law of Scotland prevailed,<sup>3</sup> when the term of prescription or limitation in England by the statute of James was twice that length of time. But a different case is presented from either of the foregoing, if the action has become barred entirely by the lapse of time prescribed by the law of the place where the contract was made. In such a case, where all remedies are barred by the *lex loci contractus*, Mr. Justice Story in *Le Roy v. Crowninshield*,<sup>4</sup> stated the inclination of his mind to be, that "there is a virtual extinction of the *right* in that place, which ought to be recognized in every other tribunal, as of equal validity."<sup>5</sup> He does not decide so, though he shows that it is not

<sup>1</sup> See *Le Roy v. Crowninshield*, 2 Mason (Cir. Co.), 159, 177.

<sup>2</sup> *Nash v. Tupper*, 1 Caines (N. Y.), 402. [*Perry v. Lewis*, 6 Fla. 555.]

<sup>3</sup> *Campbell v. Stein*, 8 Dow's Parl. 116.

<sup>4</sup> *Leroy v. Crowninshield*, 2 Mason (Cir. Co.), 151.

<sup>5</sup> [And this view has been countenanced in some of our courts. See post, § 67, note at the end. But in the case of *Townsend v. Jemison*, 9 How. (U. S.) 407, decided in 1850, the counsel for the plaintiff in error having undertaken to persuade the court to adopt the view to which the late Mr. Justice Story seems at one time to have been inclined, the court took occasion to review the whole subject, and the result was the affirmation of the doctrine laid down in *Le Roy v. Crowninshield*, and *McElmoyle v. Cohen*, in an elaborate opinion delivered by Mr. Justice Wayne. The question was, whether the cause of action, having accrued in Mississippi, and been completely barred there, the bar of the Mississippi statute might not be pleaded in a court of Louisiana. The court say:—

"The rule in the courts of the United States, in respect to pleas of the statutes of

without countenance from the civilians ;<sup>1</sup> and though he reasons, that where no right of action subsists by the *lex loci contractus*,

limitation, has always been, that they strictly affect the remedy, and not the merits. In the case of *M'Elmoyle v. Cohen*, 18 Peters, 312, this point was raised, and so decided. All of the judges were present and assented. The fullest examination was then made of all the authorities upon the subject, in connection with the diversities of opinion among jurists about it, and of all those considerations which have induced legislatures to interfere and place a limitation upon the bringing of actions.

"We thought then, and still think, that it has become a formulary in international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought, — the *lex fori*; otherwise the suit would be barred, unless the plaintiff can bring himself within one of the exceptions of the statute, if that is pleaded by the defendant. This rule is as fully recognized in foreign jurisprudence as it is in the common law. We then referred to authorities in the common law, and to a summary of them in foreign jurisprudence. Burge's *Com. on Col. and For. Laws*. They were subsequently cited, with others besides, in the second edition of the *Conflict of Laws*, 488. Among them will be found the case of *Leroy v. Crowninshield*, 2 Mason, 151, so much relied upon by the counsel in this case.

"Neither the learned examination made in that case of the reasoning of jurists, nor the final conclusion of the judge, in opposition to his own inclinations, escaped our attention. Indeed, he was here to review them, with those of us now in the court who had the happiness and benefit of being associated with him. He did so with the same sense of judicial obligation for the maxim, '*Stare decisis et non quieta movere*,' which marked his official career. His language in the case in Mason fully illustrates it: 'But I do not sit here to consider what in theory ought to be the true doctrines of the law, following them out upon principles of philosophy and juridical reasoning. My humbler and safer duty is to administer the law as I find it, and to follow in the path of authority, where it is clearly defined, even though that path may have been explored by guides in whose judgment the most implicit confidence might not have been originally reposed.' Then follows this declaration: 'It does appear to me that the question now before the court has been settled, so far as it could be, by authorities which the court is bound to respect. The error, if any has been committed, is too strongly engrafted into the law to be removed without the interposition of some superior authority.' Then, in support of this declaration, he cites Huberus, Voet, Pothier, and Lord Kames, and adjudications from English and American courts, to show that, whatever may have been the differences of opinion among jurists, the uniform administration of the law has been, that the *lex loci contractus* expounds the obligations of contracts, and that a statute of limitation prescribing a time after which a plaintiff shall not recover, unless he can bring himself within its exceptions, appertains '*ad tempus et modum actionis instituendæ*' and not '*ad valorem contractus*.' *Williams v. Jones*, 13 East, 489; *Nash v. Tupper*, 1 Caines, 402; *Ruggles v. Keeler*, 3 Johns. 283; *Pearsall v. Dwight*, 2 Mass. 84; *Decouche v. Savetier*, 3 Johns. Ch. 190, 218; *McCluny v. Silliman*, 3 Peters, 276; *Hawkins v. Barney*, 5 Peters, 457; *Bank of the United States v. Donally*, 8 Id. 361; *McElmoyle v. Cohen*, 13 Id. 312.

"There is nothing in *Shelby v. Guy*, 11 Wheaton, 361, in conflict with what this court decided in the four last-mentioned cases. Its action upon the point has been

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<sup>1</sup> Casaregis Disc. 179, § 60; 1 Domat, b. 3, § 4, art. 1; Strahan's translation, ed. 1737, and art. 10 of the same book and §; Ersk. Inst. b. 3, tit. 7, § 48, ed. 1812; Huberus, lib. 1, tit. 8, § 7; Voet, ad Pand. lib. 44, tit. 8, § 12.

foreign courts do not enforce the original obligation, because it is gone. It resembled the case of bankruptcy. But the learned

uniform and decisive. In cases before and since decided in England, it will be found there has been no fluctuation in the rule in the courts there. The rule is, that the statute of limitations of the country in which the suit is brought may be pleaded to bar a recovery upon a contract made out of its political jurisdiction, and that the limitation of the *lex loci contractus* cannot be. 2 Bingham, New Cases, 202, 211; Don v. Lippmann, 5 Clark & Fin. 1, 16, 17. It has become, as we have already said, a fixed rule of the *jus gentium privatum*, unalterable, in our opinion, either in England or in the States of the United States, except by legislative enactment.

"We will now venture to suggest the causes which misled the learned judge in *Leroy v. Crowninshield* into a conclusion, that, if the question before him had been entirely new, his inclination would strongly lead him to declare, that where all remedies are barred or discharged by the *lex loci contractus*, and have operated upon the case, then the bar may be pleaded in a foreign tribunal, to repel any suit brought to enforce the debt.

"We remark, first, that only a few of the civilians who have written upon the point differ from the rule, that statutes of limitation relate to the remedy and not to the contract. If there is any case, either in our own or the English courts, in which the point is more discussed than it is in *Leroy v. Crowninshield*, we are not acquainted with it. In every case but one, either in England or in the United States, in which the point has since been made, that case has been mentioned, and it has carried some of our own judges to a result which Judge Story himself did not venture to support.

"We do not find him pressing his argument in *Leroy v. Crowninshield* in the 'Conflict of Laws,' in which it might have been appropriately done, if his doubts, for so he calls them, had not been removed. Twenty years had then passed between them. In all that time, when so much had been added to his learning, really great before, that by common consent he was estimated in jurisprudence *par summis*, we find him, in the 'Conflict of Laws,' stating the law upon the point, in opposition to his former doubts, not in deference to authority alone, but from declared conviction.

"The point had been examined by him in *Leroy v. Crowninshield*, without any consideration of other admitted maxims of international jurisprudence having a direct bearing upon the subject. Among others, that the obligation of every law is confined to the State in which it is established; that it can only attach upon those who are its subjects, and upon others who are within the territorial jurisdiction of the State; that debtors can only be sued in the courts of the jurisdiction where they are; that all courts must judge in respect to remedies from their own laws, except when conventionally, or from the decisions of courts, a comity has been established between States to enforce in the courts of each a particular law or principle. When there is no positive rule, affirming, denying, or restraining the operation of foreign laws, courts establish a comity for such as are not repugnant to the policy or in conflict with the laws of the State from which they derive their organization. We are not aware, except as it has been brought to our notice by two cases cited in the argument of this cause, that it has ever been done, either to give or to take away remedies from suitors, when there is a law of the State where the suit is brought which regulates remedies. But for the foundation of comity, the manner of its exercise, and the extent to which courts can allowably carry it, we refer to the case of the *Bank of Augusta v. Earle*, 18 Peters, 519, 589; *Conflict of Laws, Comity*.

"From what has just been said, it must be seen, when it is claimed that statutes



judge admitted that the current of authority was too strong against him to be resisted. In *Bulger v. Roche*, in Massachusetts,<sup>1</sup> it is

of limitation operate to extinguish a contract, and for that reason the statute of the State in which the contract was made may be pleaded in a foreign court, that it is a point not standing alone, disconnected from other received maxims of international jurisprudence. And it may well be asked, before it is determined otherwise, whether contracts by force of the different statutes of limitation in States are not exceptions from the general rule of the *lex loci contractus*. There are such exceptions for dissolving and discharging contracts out of the jurisdiction in which they were made. The limitations of remedies, and the forms and modes of suit, make such an exception. Conflict of Laws, 271, and 524 to 527. We may then infer that the doubts expressed in *Leroy v. Crowninshield* would have been withheld if the point had been considered in the connection we have mentioned.

“ We have found too, that several of the civilians who wrote upon the question did so, without having kept in mind the difference between the positive and negative prescription of the civil law. In doing so, some of them — not regarding the latter in its more extended signification as including all those bars or exceptions of law or of fact which may be opposed to the prosecution of a claim, as well out of the jurisdiction in which a contract was made as in it — were led to the conclusion that the prescription was a part of the contract, and not the denial of a remedy for its enforcement. It may be as well here to state the difference between the two prescriptions in the civil law. Positive or the Roman *usucaptio*, is the acquisition of property, real or personal, immovable or movable, by the continued possession of the acquirer for such a time as is described by the law to be sufficient. Erskine's Inst. 556. ‘ *Adjectio domini per continuationem possessionis temporis legi definiti.*’ Dig. 8.

“ Negative prescription is the loss or forfeiture of a right, by the proprietor's neglecting to exercise or prosecute it during the whole period which the law hath declared to be sufficient to infer the loss of it. It includes the former, and applies also to all those demands which are the subject of personal actions. Erskine's Inst. 560, and 8 Burge, 26.

“ Most of the civilians, however, did not lose sight of the differences between these prescriptions, and if their reasons for doing so had been taken as a guide, instead of some expressions used by them, in respect to what may be presumed as to the extinction or payment of a claim, while the plea in bar is pending, we do not think that any doubt would have been expressed concerning the correctness of their other conclusion, that statutes of limitation in suits upon contracts only relate to the remedy. But that was not done, and from some expressions of Pothier and Lord Kames, it was said, ‘ If the statute of limitations does create, *proprio vigore*, a presumption of the extinction or payment of the debt, which all nations ought to regard, it is not easy to see why the presumption of such payment, thus arising from the *lex loci contractus*,

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<sup>1</sup> *Bulger v. Roche*, 11 Mass. 36. Lord Kames says: “ When a process is brought in Scotland for payment of an English debt, after the English prescription has taken place, it cannot be pleaded here (that is, in Scotland) that the action is cut off by the statute of limitation; but it can be pleaded here, and will be sustained, that the debt is *presumed* to have been paid. Considering that the statute can have no authority here, except to infer a presumption of payment, it follows that the plaintiff must be permitted to defeat the presumption by positive evidence, or to overbalance it by contrary presumptions, or to show from the circumstances of the case that payment cannot be presumed.” Kames's Equity, c. 8, p. 369.

thus remarked by Chief Justice Shaw: "Whether the law of prescription, or statute of limitations, which takes away every legal mode of recovering the debt, shall be considered as affecting the contract, like payment, release, or judgment, which in effect extinguish the contract, or whether they are to be considered as affecting the remedy, only by determining the time within which a particular mode of enforcing it shall be pursued, were it an open question, might be one of some difficulty." Judge Story, in his very learned work on the Conflict of Laws, seems to have arrived at a conclusion different from the inclination of his mind, as declared in *Leroy v. Crowninshield*, for he says: "It may be added, that as the law of prescription of a particular country, even in a case of a contract made in such a country, forms no part of the contract itself, but merely acts upon it *ex post facto* in a case of a suit, it cannot properly be deemed a right stipulated for or included in the contract." In confirmation of the position, he cites

should not be as conclusive in every other place as in the place of the contract.' And that was said in *Leroy v. Crowninshield*, in opposition to the declaration of both those writers, that in any other place than that of the contract such a presumption could not be made to defeat a law providing for proceeding upon suits. Here, turning aside for an instant from our main purpose, we find the beginning or source of those constructions of the English statutes of limitation which almost made them useless for the accomplishment of their end. Within a few years, the abuses of such constructions have been much corrected, and we are now, in the English and American courts, nearer to the legislative intent of such enactments.

"But neither Pothier nor Lord Kames meant to be understood, that the theory of statutes of limitation purported to afford positive presumptions of payment and extinction of contracts, according to the laws of the place where they are made. The extract which was made from Pothier shows his meaning is, that, when the statute of limitations has been pleaded by a defendant, the presumption is in his favor that he has extinguished and discharged his contract, until the plaintiff overcomes it by proof that he is within one of those exceptions of the statute which takes it out of the time after which he cannot bring a suit to enforce judicially the obligation of the defendant. The extract from Lord Kames only shows what may be done in Scotland when a process has been brought for payment of an English debt, after the English prescription has taken place. The English statute cannot be pleaded in Scotland in such a case, but, according to the law of that forum, it may be pleaded that the debt is presumed to have been paid. And it makes an issue, in which the plaintiff in the suit may show that such a presumption does not apply to his demand; and that without any regard to the prescription of time in the English statute of limitation. It is upon this presumption of payment that the conclusion in *Leroy v. Crowninshield* was reached; and, as it is now universally admitted that it is not a correct theory for the administration of statutes of limitation, we may say it was in fact because that theory was assumed in that case that doubts in it were expressed, contrary to the judgment which was given, in submission to what was admitted to be the law of the case."]



the language of Lord Brougham, in giving his judgment in the House of Lords, in *Don v. Lipmann*.<sup>1</sup> "It is said that the limitation is of the very nature of the contract. First, it is said that the party is bound for a given time, and for a given time only. That is a strained construction of the obligation. The party does not bind himself for a particular period at all, but merely to do something on a certain day, or on one or other of certain days. In the case at bar the obligation is to pay a sum certain at a certain day; but the law does not suppose that he is at the moment of making the contract contemplating the period at which he may be freed, by lapse of time, from performing it. The argument that the limitation is of the nature of the contract supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a supposition, that the contracting parties look only to the period at which the statute of limitations will begin to run. It will sanction a wrong course of conduct, and will turn a protection against laches into a premium for evasiveness." The common law, beyond all doubt, has firmly fixed its own doctrine (whatever views may be entertained to the contrary by the civilians), that the limitation prescribed by the *lex fori*, in respect to remedies, must prevail in all cases of personal actions;<sup>2</sup> though in

<sup>1</sup> [In Wisconsin, when both parties reside therein till the debt is barred or a title made, the right is held to be extinguished, so that it would be a defence in another State. *Brown v. Parker*, 28 Wis. 21; *Sprecker v. Wakeley*, 11 Wis. 482; *Knox v. Cleaveland*, 18 Wis. 245, relying upon *Wires v. Farr*, 25 Vt. 41; *Davis v. Minor*, 1 How. (Miss.) 183; and *Stipp v. Brown*, 2 Carter (Ind.), 647. And such a claim will not be allowed to be proved in bankruptcy. In re *Nassau C. Ct.* (U. S.) East Dist. Wis.; 2 Central L. J. 570; even though the creditor and bankrupt reside in different States. In re *Harden*, 1 N. B. R. 895. But see In re *Ray*, 1 N. B. R. 203; and In re *Shepherd*, 1 N. B. R. 439].

<sup>2</sup> See authorities in note 10 to *Andrews v. Herriot*, 4 Cowen (N. Y.), 528; *Hubbell v. Condrey*, 5 Johns. (N. Y.) 152; *Pearsall v. Dwight*, 2 Mass. 84; *Decoushe v. Sevatier*, 3 Johns. (N. Y.) Ch. 190; *Woodbridge v. Wright*, 3 Conn. 528; *Bulger v. Roche*, 11 Pick. 36; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Taberner v. Brentnall*, 3 Harr. (N. J.) 262; *Beardsly v. Southmayd*, 3 Green (N. J.), 171; *King v. Lane*, 7 Mo. 241; *Van Reimsedyk v. Kane*, 1 Gallis. (Cir. Co.) 371; *Le Roy v. Crowninshield*, *supra*; *Bank of United States v. Donally*, 8 Peters (U. S.), 361; *British Linen Company v. Drummond*, 10 Barn. & Cres. 903; *De la Vega v. Vianna*, 1 Barn. & Adol. 284; *Huber v. Steiner*, 2 Bing. New Cases, 202; *Hay v. Fisher*, 2 Mees. & Welsb. 722. In virtue of the well-established rule, that the law of a country where a contract is to be enforced must govern the enforcement of such contract, it was decided on appeal to the English House of Lords (reversing a decision of the Scotch Court of Session), that where bills were drawn and excepted, and became due in France, but the acceptor, a Scotchman, before such bills became due, returned to

all cases of real actions, and of actions touching things savoring of realty, the *lex rei sitæ* prevails.<sup>1</sup>

67. There is, however, a distinction between statutes of limitation, to which Judge Story refers in his "Conflict of Laws," and which he there treats as deserving of consideration. It is this: suppose the statutes of limitation of a particular country do not only extinguish the right of action but the *claim* itself, and declare it a nullity after the lapse of the time prescribed; and the parties are resident within the jurisdiction during the whole of that period, so that it has fully operated upon the case. Then the question, says the learned writer, might properly arise, whether such statutes of limitation may not afterwards be set up, in any other country to which the parties may remove, by way of extinguishment or transfer of the claim. That there are countries in which such regulations do exist in respect to real property is unquestionable;<sup>2</sup> and there are States which have declared that all right to debts due more than a prescribed term of years shall be deemed extinguished.<sup>3</sup> It has been held, that where personal property is adversely held in a State for a period beyond that prescribed by the laws of that State, and, after that period has elapsed, the possessor should remove into another State, which has a longer period of prescription or none at all, the title of the possessor cannot be questioned. Thus it has been held by the Supreme Court of the United States, that five years' possession of a slave constitutes a title by the laws of Virginia, which might be set up as a defence by the defendant in the courts of Tennessee.<sup>4</sup> But other than in that court the principle does not seem hitherto to have obtained, in this country, any direct recognition.<sup>5</sup> On the contrary, in Bul-

Scotland, and there continued till his death, that more than six years having elapsed between the time of the bills becoming due, and the action being brought, the Scotch law of prescription applied. *Don v. Lipmann*, 5 Clark & Finn. 1. [*Egberts v. Dibble*, 8 McLean (U. S.), 86; *Estes v. Kyle*, 11 Meigs (Tenn.), 84; *Watson v. Brewster*, 1 Penn. St. 381; *Crocker v. Arey*, 3 R. I. 178; *Thibodeaux v. Levasseur*, 1 Heath (36 Me.), 362; *Fletcher v. Spaulding*, 9 Minn. 64; *Bigelow v. Ames*, 18 Minn. 537; *Murray v. Fisher*, 5 Lan. (N. Y.) 98. And see *ante*, § 66, p. 63, n. 1.]

<sup>1</sup> Story's Conflict of Laws, 482 *et seq.*

<sup>2</sup> See *ante*, § 5.

<sup>3</sup> In support of this position, the author of the "Conflict of Laws" cites J. Voet, ad Pand. Lib. 44, tit. 3, §§ 5, 6, 9; Ersk. Inst. b. 3, tit. 7, §§ 1, 2, 7, 8; *Beckford v. Wade*, 17 Ves. 86; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475.

<sup>4</sup> *Shelby v. Guy*, 11 Wheat. (U. S.) 361, 471. See also *Brent v. Chapman*, 5 Cranch (U. S.), 358; *Newby v. Blackley*, 3 Hen. & Munf. (Va.) 57.

<sup>5</sup> [In *Brown v. Brown*, 5 Ala. 108, it was held that the length of adverse possession

ger *v. Roche*, in Massachusetts,<sup>1</sup> where both parties resided during the whole period of the running of the statute in Nova Scotia,

of personal property necessary to bar a claim against the possessor must be determined by the laws of the place where the adverse possession is had. And in the recent case of *Townsend v. Jamison*, 9 How. (U. S.) 407, the case of *Shelby v. Guy* is referred to and vindicated on the ground that there is a distinction between statutes giving title by possession, and such as only limit the time of bringing suits. In *Shelby v. Guy*, this court declared that, as by the laws of Virginia, five years *bona fide* possession of a slave constitutes a good title upon which the possessor may recover in detinue, such a title may be set up by the vendee of such possessor in the courts of Tennessee as a defence to a suit brought by a third party in those courts. The same had been previously ruled in this court in *Brent v. Chapman*, 5 Cranch, 358; and it is the rule in all cases where it is declared by statute that all rights to debts due more than a prescribed term of years shall be deemed extinguished, and that all titles to real and personal property not pressed within the prescribed time shall give ownership to an adverse possessor. Such a law, though one of limitation, goes directly to the extinguishment of the debt, claim, or right, and is not a bar to the remedy. *Lincoln v. Battelle*, 6 Wend. 475; *Conflict of Laws*, 582.

"In *Lincoln v. Battelle*, 6 Wend. 475, the same doctrine was held. It is stated in the *Conflict of Laws*, 582, to be a settled point. The courts of Louisiana act upon it. We could cite other instances in which it has been announced in American courts of the last resort. In the cases of *De la Vega v. Vianna*, 1 Barn. & Adol. 284, and the *British Linen Company v. Drummond*, 10 Barn. & Cres. 908, it is said, that, if a French bill of exchange is sued in England, it must be sued on according to the laws of England, and there the English statute of limitations would form a bar to the demand if the bill had been due for more than six years. In the case of *Don v. Lipmann*, 5 Clark & Finn. 1, it was admitted by the very learned counsel who argued that case for the defendants in error, that, though the law for expounding a contract was the law of the place in which it was made, the remedy for enforcing it must be the law of the place in which it is sued. In that case will be found, in the argument of Lord Brougham before the House of Lords, his declaration of the same doctrine, sustained by very cogent reasoning, drawn from what is the actual intent of the parties to a contract when it is made, and from the inconveniences of pursuing a different course. In *Beckford and Others v. Wade*, 17 Vesey, 87, Sir William Grant, acknowledging the rule, makes the distinction between statutes merely barring the legal remedy and such as prohibit a suit from being brought after a specified time. It was a case arising under the possessory law of Jamaica, which converts a possession for seven years under a deed, will, or other conveyance, into a positive absolute title, against all the world, — without exceptions in favor of any one or any right, however a party may have been situated during that time, or whatever his previous right of property may have been. There is a statute of the same kind in Rhode Island. 2 R. I. Laws, 863, 864, ed. 1822. In Tennessee there is an act in some respects similar to the possessory law of Jamaica. It gives an indefeasible title in fee-simple to lands of which a person has had possession for seven years, excepting only from its operation infants, feme coverts, *non compos mentis*, persons imprisoned or beyond the limits of the United States and the Territories thereof, and the heirs of the excepted, provided they bring actions within three years after they have a right to sue. Act of November 16, 1817, c. 28, § 1, 2. So in North Carolina,

<sup>1</sup> *Bulger v. Roche*, 11 Pick. (Mass.) 36.

where the right of action was extinguished by the local law, it was held, that the right of action, after a change of domicile of the defendant, by a removal to Massachusetts, was not thereby extinguished in the State tribunals; but might be pursued within the period prescribed by the statute of limitations of Massachusetts.<sup>1</sup> Lord Brougham, in delivering his opinion in *Don v. Lipmann*, in the House of Lords, refers to this distinction taken by Judge Story, and calls it an "excellent" one. In that case it was said that, by the law of Scotland, not the remedy alone was taken away, but that the debt itself was extinguished; but under the Scotch law of prescription, Lord Brougham said, there was no ground for the distinction, and that the debt was still supposed to be existing and owing, though the act of limitation of 1772, of Scotland, was strong with respect to the remedy to be enforced. The authority of Judge Story for the distinction was likewise cited by the counsel in *Huber v. Steiner*, in the English Court of Common Pleas,<sup>2</sup> and Chief Justice Tindal, in delivering the opinion, said, that

there is a provision in the act of 1715, c. 17, § 2, with the same exceptions as in the act of Tennessee, the latter being probably copied substantially from the former. Thirty years' possession in Louisiana prescribes land, though possessed without title and *mala fide*.

"We have mentioned those acts in our own States, only for the purpose of showing the difference between statutes giving title from possession, and such as only limit the bringing of suits. It not unfrequently happens in legislation, that such sections are found in statutes for the limitation of actions. It is in fact because they have been overlooked, that the distinction between them has not been recognized as much as it ought to have been in the discussion of the point, whether a certain time assigned by a statute, within which an action must be brought, is a part of the contract, or solely the remedy. The rule in such a case is, that the obligations of the contract upon the parties to it, except in well-known cases, are to be expounded by the *lex loci contractus*. Suits brought to enforce contracts, either in the State where they were made or in the courts of other States, are subject to the remedies of the forum in which the suit is, including that of statutes of limitation." *Blackburn v. Morton*, 16 Ark. 384.]

<sup>1</sup> "A doubt," says Chief Justice Shaw, in this case, "was intimated in *Le Roy v. Crowninshield* (2 Mason, Cir. Co. 151), whether, if the parties had remained subjects of the foreign country until the term of limitation had expired, so that the plaintiff's remedy would have been extinguished there, such a state of facts would not have presented a stronger case, and one of more serious difficulty. Such was the case in the present instance. But we think it sufficient to advert to a well-settled rule in the construction of the statute of limitations, to show that this circumstance can make no difference." [*Way v. Sperry*, 6 Cush. (Mass.) 289; *Carpenter v. Wells*, 21 Barb. (N. Y.) 359. *Contra* by statute in Ohio, Indiana, and Texas, *Hays v. Cage*, 2 Texas, 501; *Gordon v. Preston*, *Wright* (Ohio), 341; *Horton v. Horner*, 16 Ohio, 145; *Van Dorn v. Bodley*, 38 Ind. 402; *Snoddy v. Cage*, 5 Texas, 106.]

<sup>2</sup> *Huber v. Steiner*, 2 Bing. (New R.) 202 (5 Will. IV.).

undoubtedly the distinction, when taken with the qualification annexed to it by the author himself, appeared to be well founded. That qualification is, that the parties are resident within the jurisdiction all that period. "With such restriction," says Chief Justice Tindal, "it does indeed appear but reasonable, that the part of the *lex loci contractus*, which declares the contract to be absolutely void at a certain limited time, without any intervening suit, should be equally rescinded by the foreign country, as the part of the *lex loci contractus*, which gives life to, and regulates the construction of the contract; both parts go equally *ad valorem contractus* both *ad decisionem litis*." But in this case, which was in respect to a promissory note, the French law of prescription appertains only to the time and mode of instituting the remedy, — "ad tempus et modum actionis instituendæ;" and, therefore, the payee of promissory notes made in France may sue the maker, if resident in England, during six years from the time they became due.<sup>1</sup>

<sup>1</sup> See *Taberrer v. Brintnall*, 8 Har. (N. J.) 262; *Beardsly v. Southmayd*, 8 Green (N. J.), 171. [The general doctrine undoubtedly is that the right is not extinguished by the currency of the statute, and that the *lex fori* determines the question whether the statute is pleadable. *Johnson v. Albany*, Sus. R. R. Co. 54 N. Y. 411; *Jones v. Jones*, 18 Ala. 248, overruling *Goodman v. Monks*, 8 Port. (Ala.) 84; *Sichel v. Carrillo*, 42 Cal. 493; *Sloan v. Waugh*, 18 Iowa, 224; But see *ante*, p. 58, note. In Kansas the limitation of a foreign statute may reduce, but cannot extend the time limited by the code. *Hoggett v. Emerson*, 8 Kan. 262.

## CHAPTER IX.

## WHAT ACTIONS AND DEMANDS EX CONTRACTU MAY BE BARRED.

68. BY the third section of the statute 21 James I. it is provided (and the acts of limitation in this country contain, at least substantially, the same provision, and therefore are subject to like construction<sup>1</sup>), that all actions upon the case (other than for slander), actions of account, actions for trespass, debt, and detinue, shall be brought within six years next after the cause of such actions, and *not after*. The exception in the statute concerning the trade of merchandise, between merchant and merchant, and the limitations of actions upon torts, contained in the same section, are reserved for separate chapters.<sup>2</sup>

69. The action of *account*, which is limited by the statute, is one of the most ancient at common law. It was a remedy resorted to in cases where there was a privity, as against a bailiff or receiver, or a privity in law, as against a guardian in socage; and it is more like a bill in equity for enforcing the execution of a trust than an ordinary action. The first judgment is, that the defendant do account, which is usually called a judgment *quod computet*; whereupon, the defendant, offering to account, the court assigns auditors to take and declare the account between the parties; and then the final judgment is, that the plaintiff do recover against the

<sup>1</sup> *Ante*, § 21.

<sup>2</sup> [The Tennessee statutes of limitations apply as well to motions made under a statute, as to actions, and where the time within which action may be brought is limited to six years, as in debt, for instance, a motion will be barred also. So when the time within which action may be brought is limited to three years, as in an action on the case against a sheriff for making an insufficient return, a motion under the statute relative thereto will also be barred. *Prewett v. Hilliard*, 11 Humph. (Tenn.) 423. The statute provides that the officer shall be liable on motion. Statutes of limitation are in aid of the common law, and furnish a general rule for cases that are analogous in their subject-matter, but for which a remedy unknown to the common law has been provided by statute. Thus they apply to a case where compensation is sought for damages for land taken for a railroad. *Forster v. Cumberland Railroad Co.*, 23 Penn. St. 371. The statute, though in terms applicable to actions only, applies to all claims that may be the subject of actions, however presented. *Hart's Appeal*, 82 Conn. 521.]



defendant so much as the latter is found to be in arrear.<sup>1</sup> An extension of the remedy was for the benefit of trade and commerce, and it was allowed in mutual accounts between merchants; and any one naming himself a "merchant" might have an account against another, naming him a "merchant," and charging him as receiver.<sup>2</sup> An account is the sole remedy at law, by one partner against his copartner, or copartners, unless there has been an express promise or covenant to account, or a settlement made and a balance actually struck by mutual agreement.<sup>3</sup> It was at one time doubted whether an action of *assumpsit* would lie for the balance of an account, where there are items on both sides. It is now, however, established, that, though the items may be numerous, yet, if there be any thing due on one side, an action of *assumpsit* may be maintained for the balance.<sup>4</sup> But courts of equity began to assume jurisdiction in matters of account at an early period, and to supersede the necessity of the old action of account, which began to decline; and it has, in England, almost, if not entirely, fallen into desuetude.<sup>5</sup> Courts of equity, says the very learned writer referred to, have for a long time exercised a general jurisdiction in all cases of mutual accounts, upon the ground of the inadequacy of the remedy at law; and have extended the remedy to a vast variety of cases, to which the remedy at law was never applied.<sup>6</sup> In a court of equity, matters of account are more

<sup>1</sup> *Cottan v. Partridge*, 4 Man. & Grang. 285, per Tindal, C. J.

<sup>2</sup> 1 Story's Eq. Jur. 441. In *Cottan v. Partridge*, just cited, Tindal, C. J., said, that the only authority he had found where this action had been held to lie, between merchants, was in Fitzherbert's *Natura Brevium*, 117, D. See *post*, Chap. XV. on merchants' accounts, and *Inglis v. Haigh*, 8 Mees. & Welsb. (Ex.) 769.

<sup>3</sup> See *Ozias v. Johnson*, 1 Binn. (Penn.) 191; *Leonard v. Leonard*, 1 Watts & Serg. (Penn.) 342; *Andrew v. Allen*, 9 Serg. & Rawle (Penn.), 241. [The statute is a bar to a bill filed for an account between partners. *Prewett v. Buckingham*, 28 Miss. (6 Cush.) 92.]

<sup>4</sup> 2 Saund. 127, Williams's note (d). An opinion was intimated by Lord Ellenborough, that an action of account was the proper mode of investigating a running account between a merchant and a broker, and that *indebitatus assumpsit* would not lie. *Scott v. McIntosh*, 2 Campb. 288. But it was afterwards decided, that if, upon dissecting an account, there appear money due upon certain items, *assumpsit* will lie, notwithstanding the items on each side may be numerous. In the latter case, Gibbs, C. J., observed, that "the foundation of an action of an account is, that the party *wants an account, and is not able to prove his items without it.*" *Tomkins v. Wiltshire*, 1 Marsh. 115; s. c. 5 Taunt. 481. See also 5 Id. (note). See *Inglis v. Hay*, 8 Mees. & Welsb. (Ex.) 769; and *post*, Chap. XV. as to balance of account between merchants.

<sup>5</sup> 1 Story on Eq. Jur. 442.

<sup>6</sup> *Ibid.*

commodiously adjusted, and determined more advantageously for both parties; the plaintiff being entitled to a discovery of books, and the defendant's oath, and the defendant, on the other hand, being allowed to discharge himself by his own oath.<sup>1</sup> The period of limitation to an action of *account* is the same in equity, in suit upon matters of account, as at law. In a very early case, the Lord Chancellor was clearly of opinion, that, "where one receives the profits of an infant's estate, and, six years after his coming of age, he brings a bill for an account, the statute of limitations was a bar to such suit, *as it would be to an action of account at common law.*"<sup>2</sup>

70. *Assumpsit* is an action formerly comprehended under actions of trespass on the case, whereby damages are recovered for the breach of any promise or undertaking, that is, any contract or agreement not under seal; and was so denominated in England at the time the records were written in Latin; as, when the allegation was, that the defendant *super se assumpsit* to do that for the non-performance of which the action is brought. Although the statute of James is most highly to be commended for its objects, and has been found, in its application, of great practical utility, yet not unjustly has it been said, that it is, "unfortunately, worded very loosely."<sup>3</sup> This assertion would be justified, were it only for the omission of the action of *assumpsit* among the actions enumerated in the above section of that statute. The omission was "palpably unintentional,"<sup>4</sup> but "ex tota materia, emergat resolutio;" and, accordingly, it was construed and settled, by the early cases, to be within the statute, it coming within the same reason, and it being fairly included in trespass on the case.<sup>5</sup> The words

<sup>1</sup> See Bac. Abridg. *Accompt.*

<sup>2</sup> Per Lord Macclesfield, in 1719, in *Lockey v. Lockey*, Prec. in Ch. 518. The same rule was applied in respect to accounts between tenants in common, in *Prince v. Heylin*, 1 Atk. 898, and has ever since been recognized, in cases where the defendant is charged as a *receiver*. [The New York Statute of Limitations of 1801 is a bar to a suit in equity for an account and settlement, and for the payment of a balance due from one mercantile firm to another by reason of joint adventures in which the two firms had been engaged, when all the items of the account, on both sides, were dated more than six years previous to the filing the bill. *Didier v. Davison*, 2 Barb. (N. Y.) Ch. 477.]

<sup>3</sup> By Baron Parke, in delivering the judgment of the court in *Inglis v. Haigh*, 8 Mees. & Welsb. (Ex.) 779.

<sup>4</sup> By Lord Denman, C. J., in *Piggott v. Rush*, 4 Adol. & Ell. 912.

<sup>5</sup> Bac. Abr. Tit. Lim. of Act.; *Chevely v. Bond*, 4 Mod. 105; *Beatty v. Burnes*,



“actions upon the case,” in the statute of limitations in Ohio, it has been expressly held, include the action of *assumpsit*; <sup>1</sup> and the Supreme Court of the United States hold, that, by virtue of a statute of limitations which is not restricted to a particular cause of action, and provides that the action, by its technical denomination shall be barred, if not brought within a prescribed time, every cause for which such action may be prosecuted is within the spirit of the statute.<sup>2</sup> The provision in question, in the statute of James, is equally a bar to an action of *assumpsit* for money had and received, though it is brought to try landed title; for, wherever the remedy is limited to a particular form of action, all the general incidents of such action must attach upon it.<sup>3</sup> It is a bar, also, to an action of *assumpsit* by one tenant in common against his cotenant for perception of profits. In virtue of the provision that “all actions of debt for arrearages of rent” shall be barred, if not commenced within six years, the statute is a good defence to an action by a landlord for rent, against one who had once been a tenant from year to year, and who had not, within the last six years, occupied the premises nor paid rent.<sup>4</sup> *Assumpsit* for unliquidated damages is within the provisions of the statute, because it lies for their recovery.<sup>5</sup> It was held, at an early period, that

8 Cranch, (U. S.) 98; *Harris v. Saunders*, 4 B. & Cress. 44; *Haven v. Foster*, 9 Pick. (Mass.) 112; *Chandler v. Vilette*, 2 Saund. 120. In *Crosier v. Tomlinson*, 2 Mod. 71, the court held that the words “action of trespass,” in the proviso of section 7th of the statute, comprehends *assumpsit*. That *assumpsit* is included in trespass, according to Lord Denman, C. J., is rather wrong; but the courts, perhaps, were justified in straining the language. *Piggott v. Rush*, *supra*. It will be seen by the Appendix, that, generally, all the American acts of limitation which have undergone revision since the revolution include the action of *assumpsit*, *eo nomine*.

<sup>1</sup> *Williams v. Williams*, 5 Ohio, 444. [So in Iowa, *Maltby v. Cooper*, 1 Morris (Iowa), 59.]

<sup>2</sup> *M’Cluny v. Silliman*, 8 Peters (U. S.), 270. But in Mississippi it is held, that the clause “actions of account and upon the case,” in the fourth section of the Mississippi statute of limitations of 1822, relates exclusively to special actions of that character, and not to actions of *assumpsit* upon open accounts. *Phillips v. Cage*, 12 S. & M. (Miss.) 141.

<sup>3</sup> Per Story, J., in *Beatty v. Burnes*, *supra*.

<sup>4</sup> *Coleman v. Hutchinson*, 3 Bibb (Ken.), 210. [The statute begins to run from the time when the rent is first payable, and not from the commencement of the occupancy. *McClure v. McClure*, 1 Grant (Penn.), 222. But if articles of personal property are worn out and rendered valueless by the bailee, the bailor can recover only what they were worth six years before action brought. *Rider v. Union, &c., Co.* 4 Bosw. (N. Y.) 169; *Ibid.*, 5 Bosw. (N. Y.) 85.]

<sup>5</sup> *Leigh v. Thornton*, 1 B. & Ald. 625.

the statute extends to actions of assumpsit upon bills of exchange and promissory notes, for they are not such matters of account as are intended by the exception in the statute in respect to "merchants' accounts" but are in the nature of accounts stated, and no longer open.<sup>1</sup>

71. The action of assumpsit lies to recover damages for consequential wrongs or torts, which, though they are *ex delicto*, are *quasi ex contractu*; and they arise from *malfeasance*, or doing what the defendant ought not to do; *non-feasance*, or not doing what he ought to do; and *misfeasance*, or doing what he ought to do improperly.<sup>2</sup>

72. An action of *assumpsit* may not be barred by the statute, when, to an action for a tort upon the same demand, the statute may be pleaded. Thus it has been held, that, if a tenant for life has rendered accounts for the remainder-man of timber cut by him, during a period of more than six years before a bill in equity for an account of such timber, and of the value of it, the statute cannot be pleaded to the bill; for though, if the remainder-man had brought an action of *trover*, the tenant for life might, notwithstanding the rendering of the accounts, have pleaded the statute, he could not have done so, if the remainder-man had brought an action of *assumpsit*. This case was brought before the Vice-Chancellor, Sir John Leach, and his opinion is thus expressed: "It is clear, from the authorities, that the plaintiff might have elected to bring an action of *assumpsit*, and not *trover*, for the moneys had and received by the defendant from the sale of timber, and that the rendering of the account, as alleged by the bill, would have been an acknowledgment by the defendant, which, in the action of assumpsit, would have taken the case out of the statute of lim-

<sup>1</sup> *Chevely v. Bond*, 4 Mod. 105. Every subsequent holder, in respect to the acceptor and the maker of a note, stands in the same predicament as the payee. See *Pierce v. Crofts*, 2 Wheat. (U. S.) 385. Taking a bill of exchange is at least *prima facie* evidence of a satisfaction and extinguishment of an antecedent debt. *Wallace v. Agry*, 4 Mason (Cir. Co.), 386. [The statute may be pleaded in bar to an action brought by an execution debtor against a sheriff for the surplus of the proceeds of a sale on the execution. *Alexander v. Leckey*, 9 Barr (Penn.), 120. So, where a justice of the peace brings assumpsit for fees proved by his docket. *Harris v. Christian*, 10 Barr (Penn.), 203. In *Freeland v. McCullough*, 1 Denio (N. Y.), 414, and *Corning v. McCullough*, 1 Comst. (N. Y.) 47, the action was against a stockholder of a corporation, the members of which were made individually liable by the charter, and was assumpsit. It was held barred by the statutes. And see *post*, § 80, note.]

<sup>2</sup> 1 Tidd, 4; Browne on Actions at Law, 868.

itations.” He considered the bill before him as analogous to the action of *assumpsit*, and that the alleged render of the account defeated the plea of statute.<sup>1</sup> Where there has been a tortious taking of his property, the injured party may bring *trespass* or *trover*, or he may waive both, and bring *assumpsit* for the proceeds, when it shall have been *converted into money*; and, if he choose the latter mode of redress, the tortfeasor cannot allege his own wrong, for the purpose of carrying back the injury to a time which will let in the statute.<sup>2</sup>

73. An action of *assumpsit* by a pawnee, to recover a simple contract debt, is not the more protected from the operation of the statute because accompanied with property pledged as collateral security; for it is not, on that account, the less subject to the mischief against which the statute was intended to guard.<sup>3</sup> But, though it be clear, in such case, that the remedy to enforce the debt may be barred, yet the *lien* upon the property pledged will remain. Thus, in an action of *trover*, brought in 1800, for certain merchandise, the defendant, a wharfinger, claimed a lien upon it for the balance of a general account, which was due in 1790. It was contended, that, as the balance, under which the defendant insisted he was entitled to the lien, had accrued in 1790, it was consequently barred. But Lord Eldon considered that the debt had not been discharged, though the *remedy* to enforce it by action was taken away. Though the statute, he said, had run against a demand, if the creditor have possession of the goods on which he

<sup>1</sup> *Honey v. Honey*, 1 Sim. & Stu. Ch. 560; and *Id.* 1 Cond. Eng. Ch. 297. Though *trover* is the proper action to recover the value of specific articles, yet, if the articles have been sold by the tortfeasor, and he has *received the money*, *assumpsit* will lie. *Willett v. Willett*, 8 Watts (Penn.), 277. And see note to *Jones v. Hoar*, 5 Pick. (Mass.) 285, containing many authorities.

<sup>2</sup> Per Parker, C. J., in *Lamb v. Clark*, 5 Pick. (Mass.) 193. The facts were, in this case, that the defendant obtained possession of divers promissory notes, without a legal transfer from the owner, and received payment of some of them more than six years, and of others within six years, next before the commencement of the action. It was held, he was liable in *assumpsit* for the sums received within the six years, and that he was estopped to say, that the notes were obtained by fraud, and so an action of *trover* would have been barred by the statute. For cutting and carrying away trees, the plaintiff may waive the tort, and sue in *assumpsit*, if the trees have been sold by the defendant. *Jones v. Hoar*, 5 Pick. (Mass.) 285; *Martin v. Mayor of Brooklyn*, 1 Hill (N. Y.), 545; [*Ivory v. Owens*, 28 Ala. 641.]

<sup>3</sup> As per Gibson, C. J., in giving the opinion of the court in *Slaymaker v. Boyd*, 1 Penn. 219.

has a lien for a general balance, he may hold them for that demand by virtue of the lien.<sup>1</sup> An acceptor may retain funds to indemnify him against his acceptances, though outstanding longer than the time limited by the statute.<sup>2</sup> Where an attorney had a lien upon a judgment, and his debt was barred by the statute, it was contended that his debt was gone; but the court held, that the statute barred the remedy, but not the right; and that the attorney, who had taken no steps to recover his costs, for six years, had still a right to be paid from the sale of the goods.<sup>3</sup> Whether the security for a simple contract debt is a lien on property personal or *real*, the lien is not impaired in consequence of the debt's being barred.<sup>4</sup> Therefore, where a debt is due to A from B, by a promissory note, secured by a mortgage of real estate, though the note is barred by lapse of time, yet A is not barred of his right as mortgagee.<sup>5</sup> It is true, that Mr. Justice Sutherland, in *Jackson v. Sackett*,<sup>6</sup> intimated an opinion that a mortgage, to secure a simple contract debt, was presumed to be paid in six years, reasoning that the statute of limitations might, at the expiration of that time, be

<sup>1</sup> *Spears v. Hartly*, 3 Esp. 81. A lien is a charge upon a thing, and not a property in it. 2 Story, Eq. Jur. 46. And, if the property be voluntarily delivered up, the lien is extinguished. *Mathews v. Hopkins*, 2 M'Lean (Cir. Co.), 145.

<sup>2</sup> *Kerrison v. Williams*, 3 Campb. 418, per Lord Ellenborough.

<sup>3</sup> *Higgins v. Scott*, 2 B. & Adol. 413.

<sup>4</sup> [So the statute of limitations does not run against the lien of the grantor of land for the purchase-money, who, at the time of the sale, gave a bond for a deed, when the purchase-money should be paid, and took back bonds for the purchase-money. *Hopkins v. Cockerell*, 2 Gratt. (Va.) 88. By an act of the legislature of Pennsylvania, the land opposite to which paving, curbing, and so forth, is done by the district authorities, is made subject to a lien for the expense, and against this lien the statute of limitations relative to personal actions does not run, as there is no personal liability. *Council v. Moyamensing*, 2 Barr (Penn.), 224.]

<sup>5</sup> *Belknap v. Gleason*, 11 Conn. 160; *Thayer v. Munn*, 19 Pick. (Mass.) 535, referring to the authority of Lord Eldon, in *Spears v. Hartly*, *supra*; and *Toplis v. Baker*, 2 Cox, Eq. Ca. 128; [*Miller v. Helm*, 2 S. & M. (Miss.) 687; *Miller v. Trustees of Jefferson College*, 5 Id. 651; *Elkins v. Edwards*, 8 Ga. 325; *Crain v. Paine*, 4 Cush. (Mass.) 486; *Joy v. Adams*, 26 Me. (18 Shep.) 330; *Trotter v. Erwin*, 27 Miss. 772. And though the fact that the personal security is barred by the statute of limitations may raise a presumption of payment, this presumption may be rebutted, and whether it be so or not is a question for the jury. *Ib.* And see *post*, § 92. If the mortgage contains no covenant for the payment of money, the right of foreclosure will be barred when the note is barred. *Harris v. Mills*, 28 Ill. 44.] In New Hampshire, notes secured by mortgage are specially exempted from the operation of the statute. *Colby v. Everett*, 10 N. H. 429.

<sup>6</sup> *Jackson v. Sackett*, 7 Wend. (N. Y.) 94.

pleaded to a suit on the note. But this intimation is counter to the authorities ; and Chancellor Walworth, in *Heyer v. Pruyin*,<sup>1</sup> said it could not certainly be law ; at least, such a principle could not be applied to such a case as the one in question.

74. As an action of assumpsit cannot be maintained for a demand, after the time limited by the statute has elapsed, so a demand which has been barred by the statute cannot be *set off*. If it be pleaded in bar to an action, the plaintiff may reply the statute ; or, if it be given in evidence under a notice of set-off, it may be objected to at the trial.<sup>2</sup> It seems to be well settled, say the Supreme Court of Pennsylvania, that, if the defendant plead a set-off, the plaintiff may reply the statute, which will be a bar ; or, if the defendant, under the plea of the general issue, in England, or in this country, under the plea of payment, give the plaintiff notice of his intention to give it in evidence, the plaintiff, after it is given in evidence, may object the statute of limitations to it.<sup>3</sup> It has been held, that where an administrator pleads a set-off, which is barred by the statute, it is no answer to the objection

<sup>1</sup> *Heyer v. Pruyin*, 7 Paige (N. Y.), Ch. 470.

<sup>2</sup> 2 Bull. N. P. 180 ; and see *Ruggles v. Keele*, 8 Johns. (N. Y.) 261 ; *Hicks v. Hicks*, 5 East, 16.

<sup>3</sup> *Hinkley v. Walters*, 8 Watts (Penn.), 260 ; *Shoenberger v. Adams*, 4 Id. 480 ; *Levering v. Rittenhouse*, 4 Whart. (Penn.) 180. See also *Watkins v. Harwood*, 2 Gill & Johns. (Md.) 807 ; *Ruggles v. Keeler*, 8 Johns. (N. Y.) 268 ; [*Trimyer v. Pollard*, 5 Gratt. (Va.) 460 ; *Harwell v. Steele*, 17 Ala. 372. In the matter of *Drysdale's Appeal*, 14 Penn. St. (2 Harris) 581, heirs who were claiming their ancestors' estate were permitted to set up the statute of limitations in bar of debts due by them to the estate. But see *Rose v. Gould*, cited in note to § 75, *post*. But a person who has been absent from the State, and on his return brings a suit, cannot reply the statute to a claim in set-off, which, deducting the time of his absence, would not be barred. *Hewlett v. Hewlett*, 4 Ed. (N. Y.) Ch. 7. And it is error to exclude an account in set-off, because, on its face, it appears to be barred by the statutes. *Camp v. Gullett*, 2 Eng. (Ark.) 524 ; *Trimyer v. Pollard*, *ubi sup*. Under statute 21 Jac. I. c. 16, § 8, where a set-off is filed, the replication should be, that the cause of set-off did not accrue within six years before the commencement of the action, as the statute is not a bar to a set-off unless the six years have expired before the action in which the set-off is pleaded is brought. *Walker v. Clemens*, 9 Eng. L. & Eq. 882 ; s. c. 15 Q. B. 1046 ; *Moore v. Lobbin*, 28 Miss. 804. And in Virginia, where, by statute, 1 Rev. Code, c. 128, § 87, defendants are allowed to file a set-off any time before trial, whether the set-off accrue before or after the commencement of the action, it has been held, that if the set-off accrue before the commencement of the action, and is at the time of such commencement a subsisting and valid claim, it may be filed any time before trial, though more than five years (the limited time) may have expired between the accruing and the time of filing. But if the set-off accrues after the commencement of the action, it must be filed within five years from the time of its accruing. *Trimyer v. Pollard*, *ubi sup*.]

of the statute, that he is allowed, as administrator, nine months to collect the debts ; as, during the nine months, he may sue, though he cannot be sued.<sup>1</sup>

75. Where there are cross-demands between parties, which accrued nearly at the same time, both of which would be barred by the statute, and the plaintiff has saved the statute by suing out process, but the defendant has not, the defendant may nevertheless set off his demand. Lord Kenyon, in this case, said, that, as the transactions between the plaintiff and the defendant were all of the same date, and as the bills seem to have been given for their mutual accommodation, it would be the highest injustice to allow one to have an operation by law, and not the other ; and he held the demand of the defendant to be good, as well as that of the plaintiff, and allowed it to be set off.<sup>2</sup>

<sup>1</sup> *Turnbull v. Strokecker*, 4 M'Cord (S. C.), 210.

<sup>2</sup> *Ord v. Ruspini*, 2 Esp. 569. See *post*, Chap. XIV. on mutual accounts. [So, if a defendant insists that demands against which the statute has run be allowed, he shall not be permitted to set up the statute against similar demands put in by the plaintiff, when the claims on both sides are matters of book account. *Gulick v. Turnpike Co.*, 2 Green (N. J.), 545. The demand must be similar, and have relation to the principal claim, in the nature of a counter-claim. *Mann v. Palmer*, 8 Abb. App. Dec. 162. And lapse of time is no bar to a vendor's claim for the value of surplus land conveyed, when he is brought into court by the vendee, who seeks to recover back part of the purchase-money, on the ground that he has been ejected from a portion of the land conveyed, but still has more acres than he paid for. *Richardson v. Bleight*, 8 B. Mon. (Ky.) 580. Nor when a testator gives his residuary estate to be divided amongst his children, directing that sums of money appearing by his private ledger to be due from them, shall in the division be brought into the account, will one of the children against whom there are charges of more than six years' standing, be allowed to set up the statute for the purpose of increasing the amount of his distributive share. *Rose v. Gould*, 11 Eng. L. & Eq. 10 ; s. c. Law J. (n. s.) Ch. 860. Where an action was brought on a promissory note, and the defendant pleaded a *total* failure of consideration, and alleged a *parol* warranty of the property for which the note was given, as a part of his defence, it was held that the plaintiff could not avoid this defence by insisting on the statute of limitations, although more than four years had elapsed from the time of such parol warranty. *Munrow v. Hanson*, 9 Ga. 398. The last case does not state that an action for a breach of the warranty would have been barred, but that is the obvious inference, and all these cases seem to show that where there is any equitable matter of defence in the nature of set-off, or which might be the subject of a cross-action, growing out of the subject-matter for which action is brought, courts will permit it to be set up, although a cross-action, or an action on the claim in set-off, might be barred by the statute. Thus in an action of debt on a bond given for the price of land, a defence of partial failure of consideration, because of a deficiency in quantity, is not barred by the statute. *Evans v. Yongue*, 8 Rich. (S. C.) 118. So in a suit on a bond against the widow and heirs of the obligor, the defence of payment by board furnished the obligee under an agree-



76. The action of *debt*, when "grounded upon any lending or contract *without specialty*," is one of the actions *ex contractu* to recover a sum certain, the bringing of which is limited by the statute to six years next after the cause of action accrued.<sup>1</sup> The forms of a declaration in an action of *assumpsit*, and in an action of debt on simple contract, are very similar. There are, however, certain words, by which they are distinguished, and which give the one or the other character to the action. In what consists the principal difference is stated by Mr. Justice M'Lean: "The action of debt is founded upon the contract; the action of *assumpsit* upon the promise." "In debt," he says, "the consideration of the contract must be stated, as also any inducement necessary to explain the contract or consideration, and it should be stated that the party *agreed* to pay: stating that he *promised* to do so would be bad."<sup>2</sup>

77. *Covenant* usually lies only upon contracts *under seal*; and, therefore, unless the defendant have executed an instrument under seal, this action is not maintainable.<sup>3</sup> It lies on all instruments

ment that it should be applied to reduce the bond was held good, although most of the account for board had accrued more than six years before the action was brought. *King, Admr. v. King*, 1 Stockt. (N. J.) 44. So in an action to recover the balance of the price of goods sold, unsoundness may be set up in defence, although an action to recover back the amount originally paid would be barred. *Riddle v. Kreinbicht*, 12 La. Ann. 297. And see *post*, § 109, note, as to the set-off of usurious interest paid. The Indiana statute of limitations exempts from its operations so much of any matter pleaded as payment or set-off as shall equal the amount of the plaintiff's demand. R. S. 1838, p. 447. *Lastrapes v. Roquette*, 23 La. An. 68. Any excess, it seems, would be barred. *Livingwood v. Livingwood*, 6 Blackf. (Ind.) 268. But it has been recently held in Pennsylvania that the running of the statute against a claim which the defendant interposes in set-off is not stopped by the commencement of the suit, nor till the set-off be pleaded. *Gilmore v. Reed*, Sup. Ct. (Pa.) Jan. 75; 7 Leg. Gaz. 18.]

<sup>1</sup> [See *post*, *The Masters, Warden, &c. v. Loder*, cited in the note to § 79, at the end. An action of debt against a devisee of land, to recover money charged thereon, is not an action grounded on any lending or contract not under seal. *Wilson v. Towle*, 19 N. H. 244. "Actions of debt grounded on only contract in writing" include all suits brought to recover money for the breach of a contract in writing, without regard to the technical distinction between debt and damages. *Robinson v. Varnell*, 16 Texas, 862.

<sup>2</sup> *Metcalf v. Robinson*, 2 M'Lean (Cir. Co.), 863. See also *Emery v. Fell*, 2 Term, R. 28; *Brill v. Neele*, 3 B. & Ald. 208. In which case, the declaration was demurred to, the cause assigned being the misjoinder of debt and *assumpsit* on the several counts. See also *Dalton v. Smith*, 2 Smith, 618, in which the court held a similar declaration to be bad.

<sup>3</sup> Com. Dig. *Pleader*.

under seal containing either express or implied covenants.<sup>1</sup> But, wherever a covenant is not under seal, or wherever there has been a contract under seal, and a subsequent and distinct simple contract, founded upon a new consideration, and the plaintiff is proceeding upon the simple contract, the action must be assumpsit, and not covenant,<sup>2</sup> and, consequently, is liable to be barred.<sup>3</sup>

78. All demands upon simple contract are barred by virtue of *presumption of payment* at the expiration of *twenty years*, though the statute be not pleaded, to prove the payment of which any evidence is admissible upon the general issue.<sup>4</sup> The court will instruct the jury, that they may presume, after that period, the settlement of an account, and the balance paid.

<sup>1</sup> Browne on Actions at Law, 858, who cites 6 Bing. 656.

<sup>2</sup> Head v. Wadham, 1 East, 619; and per Lord Kenyon, C. J., in the King v. Beeston, 8 D. & East, 592; White v. Parkin, 12 East, 578.

<sup>3</sup> [The statute is no bar to a bill in equity to compel a specific performance of a contract of sale. Washburn v. Washburn, 4 Ired. (N. C.) Eq. 806. And see *ante*, § 26, note. In New York, under the Code, suits to compel a specific performance are made cognizable by the courts of common law. In such cases the statute begins to run from the time the plaintiff has notice that his right is denied; nor can he, or his assignee, by a new demand of performance, create a new cause of action. Bruce v. Tillson, 25 N. Y. (11 Smith), 194.]

<sup>4</sup> Jackson v. Sackett, 7 Wend. (N. Y.) 94; Bass v. Williams, 8 Pick. (Mass.) 187. This is so obvious, that it would be superfluous to cite additional authority. It is fully comprehended by the general doctrine of presumptive evidence, arising from a forbearance to sue for twenty years, and which includes *specialties*. [See *post*, §§ 98, 159.]



## CHAPTER X.

## SPECIALTIES.

79. IN *indebitatus assumpsit*, the general rule is, that the plaintiff must show, in his declaration, the certain cause of the debt for which the defendant promised; the reason being that it may appear that the debt is not a *contract of record*, and not one *under seal*; the language of the statute being "all actions," &c., "without specialty."<sup>1</sup> In *Walker v. Witter*,<sup>2</sup> it was admitted on the part of the defendant, that *indebitatus assumpsit* would have lain, and, on the part of the plaintiff, that the judgment (one obtained in the Supreme Court of Jamaica) was only *prima facie* evidence of debt. "That," said Lord Mansfield, "being so, the judgment was not a specialty, but the debt only a simple contract debt." From this, reasons Van Ness, J., in *Pease v. Howard*,<sup>3</sup> it would seem to follow, that if the judgment had been *conclusive* evidence of the debt, it would have been a specialty, and that, of course, the statute of limitations could not have been a bar. This mode of viewing the matter seemed to him to derive great weight from the *nature* and *effect* of a specialty, which, being under seal, imports a consideration, and the want of one cannot be alleged by plea; this and the solemnity which attends the execution of it are the only reasons why it ranks higher in the scale of contracts than a writing without seal or a mere parol agreement. The learned judge also drew the distinction between the actions of debt founded upon any contract *without specialty*, which are actions founded upon

<sup>1</sup> Specialties are not within the evils intended. 1 Saund. 882; 2 Id. 66. [An agreement to vary the terms of a bond indorsed thereon, and signed by the parties thereto, but not sealed, with a subsequent sealed agreement, also indorsed, to extend the time during which the bond should be in force, is a sealed instrument, the last agreement under seal acting upon and giving the force of a specialty to the first parol indorsement. *Loring v. Whittemore*, 18 Gray (Mass.), 228. And in Georgia it has been held that an unsealed indorsement on a sealed instrument is a contract under seal. *Milledge v. Gardner*, 29 Ga. 700.]

<sup>2</sup> *Walker v. Witter*, 1 Doug. 1.

<sup>3</sup> *Pease v. Howard*, 14 Johns. (N. Y.) 479.

contracts in *fact*, and such actions of debt as are created by construction of *law*.<sup>1</sup>

80. It has accordingly been long established, that where the liability of the defendant is created not merely by the act of the parties, but by the positive requisitions of a statute, the plaintiff is not barred. Thus, where debt was brought on the statute of *tithes*, for carrying away the corn, the defendant pleaded for the last three years *non debet*, and for the residue, the statute of limitations ; and the plaintiff thereupon demurring, and the record being read, all the judges held, that the statute did not extend to the action.<sup>2</sup> Thus, again, in another of the old cases, an action of debt for an escape was held not to be reached by the statute, both because it was not founded upon any lending or contract, and was founded on a specialty ; namely, on *statute law*.<sup>3</sup> The construction has been applied to one of a class of statutes in this country which have now become common, in the case of *Bullard v. Bell*,<sup>4</sup>

<sup>1</sup> 1 Saund. 86, 87, 88 ; 2 Id. 64, 65, &c., and in notes and cases there cited. See also *Cartmill v. Hopkins*, 2 Mo. 220 ; *Tilghman v. Fisher*, 9 Watts (Penn.), 441. The statute may be pleaded to *indebitatus assumpsit* against the sheriff for money levied upon a *feri facias*. 1 Mod. 246, and *Cockram v. Welby*, 2 Id. 212. One form of action may be founded upon a specialty, namely, the record of the judgment ; in the other form it is founded on a *contract*. In one case the statute is not pleadable, in the other it is. *Ibid.* Debt lies on all *specialties* to recover a demand for money secured thereby. It lies upon bonds, whether for the payment of moneys or performance of any other act ; upon recognizances, and upon judgments, and decrees. It lies, also, upon statutes where an action of debt is given by statute ; and where the statute provides for the payment of a sum of money, or gives a penalty or forfeiture on the doing of a forbidden act, but does not mention any mode of recovering it. 1 Saund. 288, note 1 ; *Browne on Actions at Law*, 345 ; *White v. Parkin*, 12 East, 578. [But an action of debt for a penalty due under a by-law made by virtue of a charter is an action of debt grounded upon a contract without specialty, and is barred by 21 Jac. I. c. 16, § 8, if not commenced within six years after the penalty becomes due. *The Master, Warden, &c. v. Loder*, 6 Eng. L. & Eq. 809. The official recognizance of a sheriff is not a specialty. *Brainerd v. Stewart*, 38 Vt. (4 Shaw) 402. Nor is the statute liability in treble damages, of one tenant in common to another for wastes, a specialty, or a penalty within the meaning of the statute limiting actions for penalties to one year. *Adams et al. v. Palmer*, 6 Gray (Mass.), 338. And proceedings to enforce a sentence are not a suit to recover a penalty. *Commissioners, &c. v. Andrews*, 10 Eq. (S. C.) Rich. 4.

<sup>2</sup> Cro. Car. 513. [The duties imposed on vessels passing from, to, or by Ramsgate, by statute (32 Geo. III. c. 74, § 81), are not within the statute of limitations, being a specialty. *Shepherd v. Hills*, 32 Eng. L. & Eq. 533.]

<sup>3</sup> *Jones v. Pope*, 1 Saund. 38. An action founded upon a statute, such as debt for an escape, cannot be barred. Per Curiam, *Ward v. Reeder*, 2 Har. & M'Hen. (Md.) 154 ; [Lane v. Morris, 10 Ga. 162.]

<sup>4</sup> *Bullard v. Bell*, 1 Mason (Cir. Co.), 243.

by Mr. Justice Story. The learned judge held, that the statute of limitations of New Hampshire (which, in respect to specialties, is a transcript of the statute of James) did not apply as a bar to an action of debt, against a stockholder of a bank, under the provisions of its charter, imposing a personal responsibility upon the shareholders, for the notes of the institution, in case they should be dishonored. This judgment was accompanied by the following opinion : —

“ I agree at once to the position, that the bills of the bank are to be considered originally as the debts of the corporation, and not of the corporators ; and, except from some special provision by statute, the latter cannot be made answerable for the acts or debts of the former. They are altogether, in law, distinct persons, and capable of contracting with each other. But the corporators are not strangers to the corporation. On the contrary, the law contemplates a privity between them ; and upon that privity has created an obligation on the corporators, under certain circumstances, to pay the debt of the corporation. Nothing can be better settled than that an action of debt lies for a duty created by the common law, or by custom. *A fortiori* it must lie, where the duty is created by statute. Whatever is enjoined by statute to be done creates a duty on the party, which he is bound to perform : the whole theory and practice of political and civil obligations rest upon this principle. When, therefore, a statute declares, that, under certain circumstances, a stockholder in a bank shall pay the debt due from the bank, and those circumstances occur, it creates a direct and immediate obligation to pay it. The consideration may be collateral or not ; but it is not a subject-matter of inquiry, and to deny that it is a duty on the stockholder to pay the money is to deny the authority of the statute itself ; for a duty is nothing more than a civil obligation to perform that which the law enjoins. Here, then, the law has declared, that the stockholders shall be liable to pay a specific sum, and it imposes on them a duty so to do. How then can the court say, that debt does not lie, since there is a duty on the defendant to pay the plaintiff a determinate sum of money ? There is no room, under this view of the case, for entertaining any question as to collateral undertakings. The law has created a direct liability, a liability as direct and cogent as though the party had bound himself under *seal* to pay the amount, in which case debt would undoubtedly lie. The law

esteems this an obligation created by the highest kind of specialty. Indeed if debt would not lie in this case, it is inconceivable how assumpsit could. There is no pretence of any express promise; and if a promise is to be implied, it must be because there exists a legal liability, independent of any promise sufficient to sustain one. Now, the very notion of a collateral undertaking is, that there exists no legal liability independent of the promise to create a duty. And if there exists a duty sufficient to raise a promise, then it is sufficient to sustain an action of debt.”<sup>1</sup>

81. But there is a distinction between the liability directly imposed by a statute, and one simply having relation to it. As, in the case of the assignment of a debt, by the commissioners of a bankrupt, the assignment being by virtue of *act of Parliament*, a plea of limitation would avail; because the debt was created and the obligation imposed by the act of the parties, both before the assignment and the statute; and it is an invariable rule, that, when the time of limitation begins to run, nothing subsequent will stop it.<sup>2</sup> So, where the South Sea Company (in whom the estates of the directors were vested by act of Parliament) filed a bill to which the statute of limitations was pleaded. It being argued that the claim of the plaintiffs was a matter of record, and consequently the debt not within the statute, the Lord Chancellor held the law to be clearly otherwise; and he compared it to the case of

<sup>1</sup> See *Van Hook v. Whitlock*, 8 Paige (N. Y.), Ch. 409; [*Atwood v. R. I. Ag. Bank*, 1 R. I. 376; *Jordan v. Robinson*, 3 Shep. (Me.) 167; *Lane v. Morris*, 8 Ga. 468. In New York (2 R. S. 298, § 81) it is provided that “an action upon any statute made or to be made for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of this State, shall be commenced within three years after the offence committed or the cause of action accrued, and not after; and where an action was brought against a stockholder of an incorporated trading company, the charter of which provided that the stockholders should be liable for its debts, and that a creditor might, after judgment, obtained against the corporation, and execution returned unsatisfied, sue any stockholder, it was held, that the above limitation of three years did not apply (overruling *Freeland v. McCullough*, 1 Denio, 414); but that the liability, not being *created* by the statute, was within the general provision of the statute limiting to six years all actions of account, assumpsit, or on the case, founded on any contract or liability express or implied. *Corning v. McCullough*, 1 Comst. (N. Y.) 47. The form of the action in this case was assumpsit. In *Bullard v. Bell*, it was debt. The learned judge (Jones), who gave the opinion, discusses the nature of the liability created by the statute, at much length, and expresses views not easily to be reconciled with the doctrine of the latter case.]

<sup>2</sup> *Coply v. Dorkmiquie*, 2 Lev. 166. [That there are exceptions to the rule, see *post*, § 196, note.]

an assignee, under a commission of bankruptcy, who, though he claims under the acts concerning bankrupts, and also by virtue of the assignment, which is under the great seal, yet, as he stands only in the place of the bankrupt, against whom the statute of limitations is pleadable, so is he (the assignee) liable to be barred thereby.<sup>1</sup> So assumpsit will lie against a trading corporation, upon a bill of exchange, when the power of drawing and accepting is recognized by statute.<sup>2</sup>

82. For the same reason that the time of limitation is not pleadable to a liability imposed by statute, it is not pleadable to a liability founded on a *judgment of court*.<sup>3</sup> Thus, in an action on the case against a sheriff, for that he levied such a sum of money upon a *fiery facias*, at the suit of the plaintiff, and did not bring the money into court, at the day of the return of the writ, *per quod*, *etc.*, the court held, that if the *fiery facias* had been returned then, the action would have been grounded on the record, and it is the sheriff's fault that the writ was not returned, and that the judgment was the foundation of the action.<sup>4</sup> So in the Supreme Court of the State of New York, in error on *certiorari* to a justice's court. The action in the court below was founded upon a judgment rendered before another justice, *six* years before the present suit, and the only question raised was, whether a suit on a judgment in a justice's court was barred by the statute of limitations. Van Ness, J.: "Whether a justice's court is strictly a court of record, it is not material to determine in this case; for if it be not, it is settled that a judgment rendered in it is conclusive evidence of a debt,

<sup>1</sup> 8 P. Wms. 14.

<sup>2</sup> *Murray v. East Ind. Co.*, 5 Barn. & Ald. 204.

<sup>3</sup> [*Dudley v. Lindsey*, 9 B. Mon. (1 Ky.) 486; *Mitchell v. Mitchell*, 8 Humph. (Tenn.) 859; *Todd v. Crumb*, 5 McLean, 172; *Reddington v. Julian*, 2 Carter (Ind.), 224. But where several joint debtors are sued, some of whom are not served with process, and judgment is obtained against all pursuant to the statute, such judgment does not prevent the running of the statute of limitations in favor of those defendants who were not served with process. *Bruen v. Bokee*, 4 Denio (N. Y.), 56. In Arkansas, the statute cannot be pleaded to a *scire facias* to revive a judgment, because it is not the commencement of an action. *Brown v. Byrd*, 5 Eng. (Ark.) 533. See also *Evans v. White*, 7 Eng. (Ark.) 83. Otherwise in Maryland, *Beanes v. Hamilton*, 3 Gill (Md.), 275; and in Indiana, *Simpson v. Lassalle*, 4 McLean, 352. A judgment under the Mill Acts of Maine is not within the statute. *Knapp v. Clark*, 30 Me. (17 Shep.) 164. In North Carolina, judgments are barred by statute in ten years after the return day of the last execution. *Butts v. Patton*, 11 Iredell (N. C.), 262. *Ante*, § 65].

<sup>4</sup> 1 Mod. 246. No statute limits the lien of a judgment in Pennsylvania, in favor of the heirs of a debtor. *Brobst v. Bright*, 8 Watts (Penn.), 124.

and the merits of such a judgment, while it remains in force, cannot be overruled, or controverted in an original suit at law, or in equity; and it is as final, as to the subject-matter of it, to all intents and purposes, as a judgment in this court." He therefore concluded, that an action of debt upon a judgment in a justice's court, is not barred by the statute of limitations,<sup>1</sup> and so also it has subsequently been expressly held by the Supreme Court of New Hampshire.<sup>2</sup> But by the Superior Court of South Carolina, it was held, that a judgment of a court of justice, for the trial of causes small and mean, is within the operation of the statute; the reason assigned being that such a judgment is not a matter of record.<sup>3</sup> Though the *Marine* Court of the city of New York is a court of record for certain purposes, it does not act as such in the exercise of its jurisdiction between party and party; and consequently the statute of limitations is a good defence to an action in one of its judgments.<sup>4</sup>

83. The rule that the statute is not pleadable to a judgment of court does not apply to a *foreign* judgment. A foreign judgment, being *prima facie* evidence of the debt only, is considered of no

<sup>1</sup> *Pease v. Howard*, 14 Johns. 479. [Otherwise now in New York, by statute. *Carshore v. Huyck*, 6 Barb. (N. Y.) S. C. 588.] It was said to have been resolved, that the statute was not a good plea against an attorney, that brings his action for fees, because they depend upon a record, and are certain. 1 Mod. 246. In the case of *Rudd v. Birkenhead*, Carth. 144, no such objection was made to the plea, in an action of assumpsit by an attorney; but in *Oliver v. Thomas*, 3 Lev. 367, where assumpsit was brought for fees, and money expended, and labor and pains in prosecuting divers suits, the defendant pleaded the statute, whereupon the plaintiff demurred; and it was argued, for the plaintiff, that this action being by several counts, or declarations whereof *one* only was for fees, the statute was not pleadable to that count for fees only, because it arises upon matter of record, namely, *his being attorney of record*. But, by the whole court, it was held, that the statute is pleadable to the count for fees; for the fees are not of record; and a case was cited, where it was so adjudged within two years before, whereupon judgment was given to the defendant.

<sup>2</sup> *Mahurin v. Bickford*, 8 N. H. 54.

<sup>3</sup> *Griffin v. Heaton*, 2 Bail. (S. C.) 58.

<sup>4</sup> *Lester v. Redmond*, 6 Hill (N. Y.), 590. [In Massachusetts, judgments of a justice of the peace are barred by statute. But the Police Court of Lowell was held to be a court of record, and its judgments not within the statute. *Bannegan v. Murphy*, 13 Met. (Mass.) 251. And in Maine, a judgment of the court of county commissioners is barred in six years. *Woodman v. Somerset*, 87 Me. 29. A decree of the Orphans' Court, fixing the amount in the hands of an executor, is in the nature of a judgment, and not within the statute. *Burd v. M'Gregor*, 2 Grant (Penn.), 353. But in Mississippi, it is held that a decree rendered in the Probate Court in favor of a distributee, against the administrator, is within the statute. *Dilworth v. Carter*, 82 Miss. (3 George), 206.]



higher nature than a simple contract, and a necessary consequence of this is, that the statute of limitations may be pleaded to it.<sup>1</sup> In an action upon a judgment, obtained in the Supreme Court of Jamaica, Lord Mansfield says: "The question was brought to a narrow point; for it was admitted, on the part of the defendant, that *indebitatus assumpsit* would have lain, and on the part of the plaintiffs, that the judgment was only *prima facie* evidence of the debt." That, says he, being so, the judgment was not a specialty, but the debt only a simple contract debt.<sup>2</sup> In a case before the King's Bench, in 1825, which was assumpsit on judgment obtained in one of the superior courts of Ireland, the plaintiff having obtained a verdict, a rule *nisi* had been obtained for arresting the judgment upon the ground that *since the union* assumpsit would not lie on any such judgment. The case of *Otway v. Ramsay*, which is shortly reported in *Strange*, 1090, and which was error from the Court of King's Bench, in Ireland, was cited by the counsel; by which it appeared to have been solemnly decided, after two arguments, that, *before the union*, a judgment given in England had not the force and effect in Ireland of a judgment of record in that country. Mr. Chief Justice Abbott observed: "We do not say that the action of debt may not be maintained on an Irish judgment; but, if it be a record in this country, it must have all the consequences of a record; it must bind lands, and rank as a specialty debt in the distribution of personal assets. I have inquired of a very learned person, whether, in marshalling assets, it is considered to be entitled to priority as an English judgment; and the result of that inquiry is, that it is not." And the court were of opinion, that a judgment obtained in Ireland since the union is not a record in England, and assumpsit is maintainable upon such judgment.<sup>3</sup>

<sup>1</sup> *Pease v. Howard*, 14 Johns. 470. And see *Dupleix v. DeRoven*, 2 Vern. 540.

<sup>2</sup> *Walker v. Witter*, Doug. 1.

<sup>3</sup> *Harris v. Saunders*, 4 Barn. & Cress. 411. In *Hay and Another v. Fisher* (2 Mees. & Welsb. 722), which was an action to recover the amount of a bill of exchange, drawn by the plaintiffs upon and accepted by the defendants in Scotland, more than six years before the commencement of the action, — the plaintiffs, to bar the statute of limitations, introduced a count stating the drawing and acceptance of the bill, and setting forth at length the making and registering of a protest of non-payment in the Court of Session in Scotland, and the issuing and execution of letters of horning and poinding on the defendant, charging him to make payment of the amount of the bill and interest to the plaintiffs, according to the law of Scotland, and his default thereto; and alleging, that, by virtue of the several premises, the defendant became liable to

84. It has been held by the Supreme Court of the United States, that the statute of limitations of Georgia may be pleaded to an action in that State, founded upon a judgment rendered in the State of South Carolina.<sup>1</sup> Though it has been expressly decided in the State of New York, that, as a judgment of court in one State is in another State regarded as a foreign judgment, the statute of such other State may be pleaded in bar to it, as if it were a simple contract debt;<sup>2</sup> yet in the Supreme Court of Pennsylvania, Duncan, J., who gave the opinion of the court, after reviewing the authorities, came to the conclusion that actions of debt on foreign judgments were not within the limitation. The case of *Dupleix v. DeRoven*, he said, was the first English case where the statute was held pleadable to a foreign judgment, and it was because the origin of the debt was simple contract, and the only

pay the plaintiffs the amount of the bill with interest, and being so liable, promised to pay the same. At the trial, a Scotch advocate (Mr. Mackenzie), who was examined for the plaintiffs, as to the proceedings necessary in such a case, by the law of Scotland, to bar the statute of prescription, stated that, according to the Scotch law, a bill of exchange is usually protested on the third day of grace, or, against the acceptor, within six months from that day; then the protest may be immediately recorded in the books of the Court of Session, against the debtor. If no action is raised or execution issued within six years from the last day of grace, the bill is affected by the statute of limitations; but if diligence is raised and executed, or action commenced, within the six years, the statute of limitations is barred, and the party may commence an action at any time within forty years. The witness then described the forms of the process of diligence by protest, — registering the same in the books of court, and the issuing and execution of the letters of horning and poinding; and stated that the diligence is complete, so as to bar the prescription when the debtor has been charged by the messenger to make payment, and of which charge the legal evidence is the return of the officer, written on the letters of horning. On cross-examination, he said, that the original process recorded in court was held to be a *judgment*, and the judgment was complete upon the registration: It was held, that such count did not disclose a sufficient cause of action as upon a *judgment* in Scotland, as it did not aver that the registration was equivalent to a judgment or decree, or that there was a judgment or decree. In England, the prescription of Scotland is regarded as the prescription of a foreign country, and simple contracts, whatever may be the law of Scotland, where they are made, yet if they be sued in England, the English statute will in general apply. Chitty & Hulme on Bills, 618. Though by the law of Scotland, where the contract is made, a party may have forty years to proceed on it, he would in England only have six years. *British Linen Co. v. Drummond*, 10 Barn. & Cress. 903. And see *ante*, Chap. VIII.

<sup>1</sup> *McElmoyle v. Cohen*, 13 Peters (U. S.), 812. And see also *Brown v. Parker*, 28 Wis. 21, and *ante*, Chap. VIII.

<sup>2</sup> *Hubbell v. Condrey*, 5 Johns. (N. Y.) 182; *s. p.* *Bissell v. Hall*, 11 Johns. (N. Y.) 168. In the former case it was held that the statute was a good plea to an action of debt brought in New York, on a judgment in Connecticut; and the judgments of courts of other States were held in both cases to be simple contract debts.



action that could be maintained was *indebitatus assumpsit*, or *insimul computassent*.<sup>1</sup>

85. It has been suggested,<sup>2</sup> that a similar doctrine as that held in the above case in Pennsylvania might now be held in the State of New York, in relation to judgments of *justices of the peace* in other States, as the decision in the case of *Thomas v. Robinson*<sup>3</sup> seems to consider them conclusive evidence of debt, wherever it is made to appear that such justices had jurisdiction. A judgment of a justice of the peace in another State is, perhaps, not technically a specialty; but it is thought that there is as much reason why it should be excepted from the operation of the statute as a bond;<sup>4</sup> and Van Ness, J., says: "The settled construction of the statute is, that it applies solely to actions of debt founded upon contracts *in fact*, as distinguished from those arising by construction of law."<sup>5</sup>

<sup>1</sup> *Richards v. Polgreen*, 13 Serg. & Rawle, 398. [In Mississippi, by statute, judgments and decrees of sister States are barred. *Boyd v. Barrenger*, 28 Miss. (1 Cush.) 269. So in Arkansas, *Brian v. Tims*, 5 Eng. (Ark.) 597. And in Illinois, *Baker v. Brown*, 18 Ill. 91; *Van Alstine v. Lemons*, 19 Ill. 394. In Texas, they are barred in ten years. *Allison v. Nash*, 16 Texas, 560. In Maine it has been held, that an action on a judgment of the Supreme Court of New Brunswick, though a foreign judgment, and but *prima facie* evidence, is nevertheless not barred by the statute where the original cause of action was a witnessed promissory note. *Jordan v. Robinson*, 3 Shep. (Me.) 167. And the words of the Stat. 1821, c. 62, § 7, "limiting actions of debt grounded on any contract without specialty," do not include actions on contracts implied by law. *Id.* And in Alabama, a judgment of a sister State does not come within a like provision. *Keith v. Estill*, 9 Port. (Ala.) 669. So in South Carolina, *Napier v. Gidiere*, Spears (S. C.), Ch. 215; where the court say, that the judgment is conclusive and operates as a merger of the original cause of action. So in Texas and Iowa, *Clay v. Clay*, 13 Texas, 195; *Read v. Boyd*, *Id.* 241; *Moore v. Paxton*, 1 Hemp. 51; *Latouréte v. Cook*, 5 Iowa, 513. In *Kimball v. Whitney*, 15 Ind. 250, it was decided, in a case involving the judgment of a court of Ohio, that it was not a specialty. But the courts of Ohio hold that even the judgment of a justice of the peace of another State is a specialty within the meaning of their statutes. *Stockwell v. Coleman*, 10 Ohio (N. S.), 38. As to the nature and effect of foreign judgments as evidence, see notes 636 and 637, in Cowen & Hall's edition of *Phil. on Evidence*, Vol. I. p. 858.]

<sup>2</sup> Per Parker, J., in *Mahurin v. Bickford*, 8 N. H. 54.

<sup>3</sup> *Thomas v. Robinson*, 3 Wend. (N. Y.) 267.

<sup>4</sup> *Mahurin v. Bickford*, *ut supra*.

<sup>5</sup> *Pease v. Howard*, 14 Johns. (N. Y.) 480. It has been settled in New Hampshire, that a judgment of a justice of the peace rendered in another State is not conclusive evidence of a debt, but must be considered as standing upon the same ground as a foreign judgment, leaving the merits of the case open to discussion and examination. *Robinson v. Prescott*, 4 N. H. 450. [It is not a judgment of a court of record, and an action on it is barred in Massachusetts in six years, although by the laws of

86. So the statute cannot be pleaded to an action of debt on an *award*, under the *hand* and *seal* of the arbitrators. The words of the statute, as applicable to actions of debt, are "all actions of debt grounded on any lending or contract without specialty;" and though strictly an award, under the hand and seal of the arbitration, may not to all purposes be considered as a *specialty*, that denomination being only given to an instrument under the hand and seal of the party who is bound by it; yet it has been so far considered as being of the nature of a specialty as to be within the *meaning of the statute of limitations*. For the purpose of the statute was to limit the time for bringing actions on a simple contract, without writing under hand and seal, the prosecution of which, a long time after the cause of them had accrued, was often the occasion of perjury in witnesses. But this reason will not apply to a case which may be so easily ascertained as an award, under the hand and seal of an arbitrator.<sup>1</sup> Indeed, the statute cannot be pleaded in an action of debt on an award under the hands and seals of arbitrators, even though the submission be not under seal. And it seems that if the submission be under seal, the award need not be.<sup>2</sup> And though the statute extends to all actions of debt for *arrearages of rent*, yet it is settled, as will be shown, that the statute is applicable only to rent on a *parol* lease, and not to rent reserved on a lease under hand and seal. On these grounds, the whole court, except Keeling, Ch. J., held, that an action of debt on award, though not a specialty, was not barred by the statute.<sup>3</sup>

87. It is well settled, as has just been intimated, that debt on an *indenture* reserving *rent* is not within the statute.<sup>4</sup> Thus, where the plaintiff declared upon a lease by indenture for twenty years rendering rent, and in debt for arrearages of rent, it appeared that the arrearages of rent for which the action was

the State in which the judgment was rendered execution might, at the time of bringing the action, be issued thereon. *Mowry v. Cheeseman*, 6 Gray, 515.] It, however, by no means follows, in the view of the courts of that State, that the statute of limitations may be pleaded to such judgments. Whether it may or may not does not depend upon the conclusive character of the evidence by which the action is attempted to be supported. *Mahurin v. Bickford*, *ut supra*.

<sup>1</sup> Kyd on Awards, 298.

<sup>2</sup> *Smith v. Lockwood*, 7 Wend. (N. Y.) 241; *Rank v. Hill*, 2 Watts & S. (Penn.) 56.

<sup>3</sup> *Hodsdon v. Harris*, 2 Saund. 64; s. c. very inaccurately reported in 2 Keb. 464.

<sup>4</sup> *Pease v. Howard*, 14 Johns. 479; 1 Saund. 38.

brought were due six years and more before the action brought. Richardson was first of opinion that judgment should be given against the plaintiff, because the statute extends to debts "*for arrearages of rent*" expressly; but he afterwards changed that opinion, and agreed with the other judges, that this action of debt being upon a *lease* by indenture is not limited to any time by the statute and is out of it. The words are, he said, "*all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent,*" &c.; and this is an action upon a contract by specialty. He likened it to the case of a *rent charge*, which is founded upon a deed, and is not within the statute of limitations.<sup>1</sup> So in an action of *covenant*, on an indenture of lease, in the Supreme Court of New York, it was conceded that the rent demanded, having been created by deed, of which the commencement was shown, was not within the statute of limitations; and the only point was, whether the payment of rent was to be *presumed* from lapse of time.<sup>2</sup> The words "debt for arrearages of rent" are indeed sufficiently supplied and fully satisfied by the arrearages of rent upon a demise without deed. And for such arrearages there seems to be no doubt but that the statute applies. Thus the statute is a bar to one tenant in common against another on an account.<sup>3</sup> But it is necessary to be discriminating as to whether a suit is brought upon an indenture. A bill in equity for an account alleged a partnership between two by indenture, and a dissolution by the death of one of the partners, and a parol promise by the survivor to account to the plaintiff as executor of the deceased partner. It was held that the suit was not founded upon the indenture, but upon the subsequent

<sup>1</sup> *Freeman v. Stacy*, Hut. 109. *Vide* also *Hodson v. Harris*, 2 Saund. 66; *Collins v. Goodal*, 2 Vern. 285; *Stackhouse v. Barnston*, 10 Ves. 458; *Kane v. Bloodgood*, 7 Johns. Ch. 90. The act of Pennsylvania of 1713 (see *App.*), for the limitation of actions, is not a bar to an action for the recovery of rent reserved by indenture. *Davis v. Shoemaker*, 1 Rawle (Penn.), 135; [*McQuesney v. Heister*, 83 Penn. St. 435.]

<sup>2</sup> *Bailey v. Jackson*, 16 Johns. 210. So also held in *Davis v. Shoemaker*, 1 Rawle (Penn.), 135.

<sup>3</sup> *Kane v. Bloodgood*, 7 Johns. Ch. 90; [*Elder v. Henry*, 2 Sneed (Tenn.), 81. Where a bill was filed by one tenant in common, after a partition, against the other who had been in exclusive possession, for an account of the rents and profits, it was held, that the statute of limitations did not begin to run against the demand until after the partition; overruling *Wagstaff v. Smith*, 2 Dev. (N. C.) Eq. 274; *Wagstaff v. Smith*, 4 Ired. (N. C.) Eq. 1. But the statute is no bar to the right to distrain for rent. *Vechte v. Brownell*, 8 Paige (N. Y.), Ch. 212.];

parol contract, and therefore that the statute might be pleaded in bar.<sup>1</sup>

88. With regard to *bonds*, although under certain circumstances they may be presumed satisfied, yet being *specialties*, they are not within the provision of the statute.<sup>2</sup> In a case in the State of Maine, it appeared that the statute of 1821 provided, that certain actions shall be saved from the operation of the statute of limitations, where the action shall have been actually declared in before the expiration of the limit, and where there was a failure of service of the writ. The decision of the court was, that the statute of 1821 did not apply to actions on bonds, or other specialties.<sup>3</sup>

89. But where the whole of a bond has been paid by one obligor, and he brings assumpsit against his co-obligor for contribution, it was by Lord Kenyon considered doubtful whether the statute would be a good plea. He observed, in an action by the executor of one obligor against the co-obligor for contribution, that he had considerable doubts whether the statute of limitations attached on the case. The demand, he said, arose under a *deed*; and there had been a case in which a very considerable law authority had been of opinion that such a debt was entitled to the same limitation as the deed itself.<sup>4</sup> In the year 1808, the point which was thus doubted by Lord Kenyon came before the Supreme Court of Massachusetts, and Parsons, Ch. J., said he had considered the point, and was satisfied that such a plea was good. The action was assumpsit by a *surety* on a bond, who had paid part of the debt against the principal. He could not distinguish this case in principle from a case where the action may be brought by a surety on a promissory note against the principal, for not indemnifying him against the payment of the note. In such a case, he said, it was not denied, that the statute would be a good plea, because the reason assigned is, the action is not founded on a bond. In

<sup>1</sup> Codman v. Rogers, 10 Pick. (Mass.) 112.

<sup>2</sup> Clark v. Hopkins, 7 Johns. Ch. 556; Mayor, &c. v. Horner, Cowp. 102; Summerville v. Holliday, 1 Watts (Penn.), 507.

<sup>3</sup> Brown v. Houdlette, 1 Fairf. (Me.) 899. [In Maryland, actions on 'guardians' bonds as well as on bonds of executors and administrators are limited by statute, and the statute begins to run from the time of passing the bonds, that is, their approval by the Orphans' Court, and not from the filing or the date. State v. Miller, 8 Gill (Md.), 385.]

<sup>4</sup> Cole v. Saxby, 3 Esp. 160.

the case before him, the action, he thought, was not founded on a bond, but on a promise, or *simple contract* (although the executing of the bond as a surety is the consideration of the promise), and the breach of the promise, he held, was the not indemnifying the plaintiff against the payment of the bond, and is not the non-performance of any contract to which the principal was bound by deed to the surety.<sup>1</sup>

90. The plea of the statute of limitations to an ordinary action of a *legacy* has never been known; it has long been a settled principle that the statute does not apply in such a case; and it has been ever so understood in England, both in the common-law and ecclesiastical courts.<sup>2</sup> Chancery has refused to adopt the rule by analogy to the statute, because an executor stands in the relation of a trustee, and *whilst the trust subsists*, the statute has not been permitted to run.<sup>3</sup>

91. Where a debtor executed a warrant of attorney to confess judgment for a balance of account as then stated between them, the warrant, it was held, is not a specialty which takes the case out of the statute. But the plaintiff declared in this case upon an account stated, and had merely used the warrant of attorney, as an acknowledgment by the defendant, and not as a document upon which the action was founded.<sup>4</sup>

92. Though a promissory note is secured by mortgage, it still remains a simple contract; and its being recognized by a deed under seal does not change its character. The fact that real estate is pledged as collateral security for its payment, by way of mortgage, cannot render it a specialty.<sup>5</sup>

<sup>1</sup> *Penniman v. Vinton*, 4 Mass. 276. In Maryland, a long time ago, specialties were expressly provided for. The statute of 1715, c. 28, enacts that no specialty whatsoever shall be good and pleadable, or admitted in evidence, against any person or persons of this province, after the principal debtor and creditor have been both dead *twelve years*, or the debt or thing in action above twelve years standing. See *Richards v. Maryland Insurance Co.*, 8 Cranch, 84; *Watkins v. Harwood*, 2 Gill & Johns. (Md.) 307; *Carroll v. Waring*, 3 Id. 491; *Mullikin v. Duval*, 7 Id. 855.

<sup>2</sup> [*Perkins v. Cartwell*, 4 Har. (Del.) 270. But in Mississippi it is held that, after demand, by a specific legatee, upon the executor, the term for payment fixed by the will having expired, the statute runs. *Young v. Cook*, 30 Miss. (1 George) 320. Barred by statute in Louisiana in ten years. *Nolasco v. Lurtz*, 13 La. Ann. 100.]

<sup>3</sup> *Thompson v. M'Gaw*, 2 Watts (Penn.), 161. And see *post*, Ch. XVI. § 172. [But after settlement between the executors and legatee, the trust is ended and the statute begins to run. *Young v. Cook*, 30 Miss. (1 George) 320.]

<sup>4</sup> *Clarke v. Figes*, 2 Stark. 234. [And see *ante*, § 78.]

<sup>5</sup> *Jackson v. Sackett*, 7 Wend. (N. Y.) 94; *Clarke v. Figes*, 2 Stark. 234. [But

93. By analogy to the statute of limitations, an artificial presumption has long been established, that where payment of a bond or other specialty was not demanded for *twenty years*, and there has been no circumstance to show that it was still acknowledged to be in existence, the jury are to presume payment at the end of twenty years. This doctrine has become so well settled, and has been so often recognized, that it is not requisite to cite any of the countless authorities which sustain it. It was not, however, a part of the ancient law, and, according to Mr. Justice Buller, originated with Lord Hale.<sup>1</sup>

94. In England, by the statute of 3 and 4 Will. IV. c. 42, it is now enacted, that all actions upon specialties shall be commenced within twenty years, and not after. But it is stated that, if this statute be not pleaded, the fact of payment may still be presumed from lapse of time or other circumstances which render the fact probable.<sup>2</sup>

though the note be barred, the lien of the mortgage remains good. *Sparks v. Pico*, 1 McAll. U. S. C. C. (Cal.) 497; *Nevett v. Bacon*, 82 Miss. (3 George) 212; *Longworth v. Taylor*, 2 Cin. (Ohio) 89; *Sichel v. Carrillo*, 47 Cal. 498. *Contra*, *Kyger v. Ryley*, 2 Neb. 20. A lien upon land, however, for the purchase-money, will be barred when an action for the purchase-money would be. *Littlejohn v. Gordon*, 82 Miss. (3 George) 285. In New Hampshire it is provided by statute that, when a note is secured by mortgage, the plaintiff may sue on the note so long as he has a right of action on the mortgage; and this statute includes notes secured by mortgages of personal property. *Demerritt v. Batchelder*, 8 Foster (N. H.), 583. But with foreclosure and appropriation of the property *pro tanto* in payment, the right to sue on the note ceases. *Cross v. Gannett*, 89 N. H. 140. And where personal property, as cotton, is deposited by the maker of a promissory note, with the assent of sureties, under the agreement, that, when sold, its proceeds shall be applied to the payment of the note, it will not have the effect to withdraw the note from the operation of the statute of limitations, although the cotton is sold and its proceeds applied in payment, after the maturity of the note, and within six years before action brought. *Lyon v. State Bank*, 12 Ala. 508.]

<sup>1</sup> *Oswald v. Leigh*, 1 Durnf. & East, 271. [And this presumption from lapse of time arises and may be a bar, whether the party setting it up has resided within the State or not. *Sanderson v. Olmstead*, 1 Chand. (Wis.) 190.]

<sup>2</sup> *Best on Presumptions*, &c. 188. Where an acknowledgment has been made in writing by the debtor, charging him in direct terms, or by his agent, or if there has been a part payment, or part satisfaction, of the principal and interest then due, the action may be brought within twenty years next after the time of such acknowledgment, part payment, or part satisfaction. But such special matter must be replied, and in confession and avoidance. 3 and 4 Will. IV. c. 42; *Mansel on Lim.* 25.



## CHAPTER XI.

## PROMISSORY NOTES AND BILLS OF EXCHANGE.

IN treating of the currency of the statute upon simple contracts, we commence with these written obligations, common and indispensable in commercial traffic.

95. It has been held invariably, that if a promissory note is made payable in money, *on demand*, the statute commences running from the *date* of the note; and that no special demand is necessary.<sup>1</sup> The rule is the same if such note be payable with

<sup>1</sup> Norton v. Ellam, 2 Mees. & Welsb. (Ex.) 467; Presbrey v. Williams, 15 Mass. 193; Little v. Blunt, 9 Pick. (Mass.) 488; Codman v. Rogers, 10 Id. 112; Easton v. Long, 1 Mo. 662; [Caldwell v. Rodman, 5 Jones, Law (N. C.), 139;] Ruff v. Bull, 7 Harr. & Johns. (Md.) 14; Peaslee, Administrator v. Brelt, 10 N. H. 489. In Scotland, if a promissory note is payable on demand, it is held, that the time limited runs from the date. Stephenson *contra* Stephenson, 11 Fac. Coll. 639. The expression in the Scottish statute is "from the term at which the sums in the note become exigible;" and this expression, it is held, will support the aforesaid construction. 1 Bell's Com. 305; [Wilks v. Robinson, 3 Rich. (S. C.) 182. From the delivery. Hill v. Henry, 17 Ohio 9. And see *post*, § 103. A provision to pay a note "at any time within six years," is a promise to pay on demand, though not in itself a note, and the statute runs from the date of the promise. Young v. Weston, 39 Me. (4 Heath) 492. A note given as a part of the guaranty capital of a mutual insurance company, and payable at such times and in such portions as the directors may require, but the whole payable at all events, is due from its date, and is barred in six years. Bell v. Bates, 33 Barb. (N. Y.) 627; Colgate v. Buckingham, 39 Ib. 177. Howland v. Edmonds, 24 N. Y. (10 Smith) 307, reversing s. c. 83 Barb. (N. Y.) 488. But see Hope Ins. Co. v. Weed, 28 Conn. 51. But a premium note given as the basis of assessments for losses, and payable in such portions and at such times as may be required to pay the losses, is due only upon loss and assessment therefor, and the statute does not begin to run till that time. Savage v. Medbury, 19 N. Y. (5 Smith) 32; Howland v. Edmonds, 24 N. Y. (10 Smith) 307; Sands v. St. Johns, 36 Barb. (N. Y.) 628; Howland v. Cuykerdall, 40 Ib. 320. So of a guaranty note assessable in like manner. Hope Mut. Ins. Co. v. Perkins, 2 Abb. App. Dec. (N. Y.) 383; Hope Ins. Co. v. Weed, 28 Conn. 51. And see *post*, § 115, note. The right to assess the stockholders of an insolvent bank, to obtain funds with which to redeem its bills, accrues when the bank is temporarily enjoined from further doing business, if the injunction be afterwards made perpetual. Conn v. Cochituate Bank, 3 Allen (Mass.), 42; and see *post*, § 142, note. C. being about to open an account with a banker, gave him a note signed by C., jointly with S., the defendant, for £200 on demand. At the same time they signed and delivered to the banker a memorandum, stating that the note was given as collateral for the banking account to be kept by C., and that

interest.<sup>1</sup> If the terms of such a note are, that it is not to draw interest during the life of the promissor, it will in such case support an action brought upon it immediately after it is given; and consequently the statute begins to run from its date, and is not postponed to the death of the promissor.<sup>2</sup> No days of grace are allowed on such note; and, if a note have no date, the statute runs from its delivery.<sup>3</sup> It has been held, also, that a *receipt* for a sum of money, by which the person receiving it undertook to return it, with interest, "when called on" so to do, created a cause of action from its *date*, and against it the statute runs from that time. As interest might be demanded from the date of the

the banker should be at liberty at any time thereafter to recover from them, or either of them, up to the full amount of the note, every sum which C. at any time thereafter should owe his banker on account. The note was dated December 4, 1855. No demand was made till June 30, 1856, when a balance was found due the banker. Afterwards, half-yearly statements were made C. as often as the state of the account required it, paying the balance against him, and receiving credit therefor, till February, 1861, when the account was closed, showing a balance due from C. of £175. In March, 1862, the banker brought suit against S, and it was held that the statute of limitations was no law. *Hartland v. Jukes*, 1 Hurl. & Colt. 667. And when a note is indorsed, demand and notice should be made within reasonable time, and the statute begins to run in favor of the indorser after the lapse of such reasonable time. *Mudd v. Harper*, 1 Md. 110. And see *post*, § 134. But the statute does not begin to run against the holder of an ordinary bank-note till demand and refusal at the counter. *Bank of Memphis v. White*, 2 Sneed (Tenn.), 482. If a bank closes its doors and has no place of business, a demand is not necessary in order to sustain an action on its bills. The holder may be excused from making a demand. But the bank cannot say that the statute of limitations runs in its favor from the closing of its doors, and the holder of the note may bring his action, alleging the excuse for not making the demand, at his pleasure, as would have been his right after demand, if the bank had not closed its doors. *Thurston v. Wolfborough Bank*, 18 N. H. 891. But as a general rule, where an act on the part of the creditor is necessary to fix the liability of his creditor, the act must be performed within six years from the date of the contract. *Morrison v. Mullin*, 34 Penn. St. 12.]

<sup>1</sup> *Norton v. Ellam*, *supra*. [But see *contra*. *Payne v. Gardiner*, 29 N. Y. (2 Tiff.) 146. The statute of limitations does not begin to run upon a claim until the principal, or at least some separate and distinct portion of the principal, becomes due and payable, and then only upon such distinct and separate portion. The interest accruing from year to year is not separated from the principal demand, and consequently the statute does not begin to run upon it until the principal is barred. *Grafton Bank v. Doe*, 19 Vt. (4 Washb.) 463; *Ferry v. Ferry*, 2 Cush. (Mass.) 92; *Henderson v. Hamilton*, 1 Hall (N. Y.), Sup. Ct. 314. Detached coupons are independent contracts, and the statute begins to run from their maturity. *Clark v. Iowa City*, 2 Am. L. T. (U. S.) 133; qualifying and explaining *city of Kenosha v. Lamson*, 9 Wall. (U. S.) 477; and *city of Lexington v. Butler*, 14 Ib. 282, apparently *contra*. Clifford, J., dissenting.]

<sup>2</sup> *Newman v. Kettelle*, 13 Pick. (Mass.) 418.

<sup>3</sup> *Smith v. Bythewood*, 1 Rice (S. C.), 245.



writing in this case, the court reasoned, that it was due and payable on the day of its date.<sup>1</sup> Where a receipt was given for notes to be collected and applied to a note in suit, it was held that the statute runs from its date.<sup>2</sup>

96. Although the statute begins to run against a note payable on demand, from the day of its date, it does not so against a note given so many days *after* demand. In the latter case, it commences running only from the time of the demand.<sup>3</sup> The demand must be made, however, in a reasonable time from the time of the date. What is to be considered a reasonable time for this purpose does not appear to be settled by any precise rule, and must depend on circumstances. If no cause for delay can be shown, it would seem reasonable to require the demand to be made within the time limited by the statute for bringing the action.<sup>4</sup> There is the same reason for hastening the demand, that there is for hastening the commencement of the action.<sup>5</sup> Where a note was payable twenty-four months after demand, and it was first presented for payment within six years of the action, it was held that the statute was no bar, though the note had been made more than six years before the action.<sup>6</sup>

97. With regard to notes and bills payable "after sight," or "after notice," the statute does not begin to run but from the time of presentment or notice, and does not run from the date of the bill or note.<sup>7</sup> But the necessity is the same of making the presentment or notice in a reasonable time, as it is in making a demand in a reasonable time in notes payable "after demand," as above stated. What that reasonable time is, says Mr. Justice Story, in *Wallace v. Agry*,<sup>8</sup> depends upon the circumstances of

<sup>1</sup> *Perry v. Griffith*, 1 Harr. & Gill (Md.), 439. [A promise to return a specific sum on demand, borrowed in Pike County checks, was held to be barred by the statute of limitations, when no demand was made within six years from the date of the promise. *Lafarge v. Jayne*, 9 Barr (Penn.), 410.]

<sup>2</sup> *Swift v. Lanier*, 1 Hill (S. C.), 31.

<sup>3</sup> *Wenham v. Mohawk Ins. Co.*, 13 Wend. (N. Y.) 267; *Thorp v. Combe*, 8 Dowl. & Ry. 374. See also *Richman v. Richman*, 5 Halst. (N. J.) 114; *Little v. Blunt*, and *Codman v. Rogers*, *supra*; [*Taylor v. Witman*, 3 Grant (Penn.), 138].

<sup>4</sup> [See *post*, § 118, note.]

<sup>5</sup> Per Wilde, J., who delivered the opinion of the court, *Codman v. Rogers* (bill in equity), 10 Pick. (Mass.) 120. In this case the plaintiff had lain by for seventeen years; and no sufficient reason was suggested in the bill in equity for the long delay.

<sup>6</sup> *Thorp v. Booth*, Ry. & Mo. 21 (Eng. Com. Law, 468).

<sup>7</sup> *Holmes v. Kerrison*, 2 Taunt. 323; [*Wolfe v. Whiteman*, 4 Har. (Del.) 246].

<sup>8</sup> *Wallace v. Agry*, 4 Mason (Cir. Co.), 336.

each particular case; and no definite rule has, as yet, been laid down. The question is a question of fact, he thought, for the jury, and not of law for abstract judicial decision. There is one limitation, or illustration, he said, which was material; namely, the holder is not at liberty to lock up the bill for any length of time in his own possession; but he may put it into circulation, and though it may remain a considerable time in circulation, if there be no unreasonable delay in any of the successive holders, the delay of presentment for acceptance is not fatal to the party, in case of dishonor. There is a difference between a bill or note payable at so many days after *date*, and one drawn payable so many days after *sight*. In the former case the bill must be presented by the period of its maturity; in the latter, it is sufficient if it be presented in a reasonable time.<sup>1</sup> When a bill is refused acceptance, and notice thereof be duly given, the statute runs from the time of refusal and notice.<sup>2</sup>

98. In a suit in assumpsit against the acceptor of bills of exchange drawn in Paris, and payable in Boston, at different and distant dates, amounting in the whole to nearly one hundred thousand dollars, among the pleas was the plea of the statute of limitations. In the opinion of Mr. Justice Story, the decision of the House of Lords, in the great case of *Rowe v. Young*,<sup>3</sup> settled that if a bill of exchange be accepted, payable at a *particular place*, the declaration in an action on such bill against the acceptor must aver presentment at that place, and the averment must be proved. Accordingly, he declared his opinion to be, that no action could be maintained upon the bills in question, until after a demand was made in Boston, and a dishonor there.<sup>4</sup> Such he also shows to be the law in France,<sup>5</sup> in which country the bills were drawn.

99. When a bill or note is entitled by the law-merchant to *grace*, the statute runs not from the day on which, upon the face of it, it is payable, but from the last day of grace.<sup>6</sup>

<sup>1</sup> *Wallace v. Agry*, 4 Mason (Cir. Co.), 336.

<sup>2</sup> *Whitehead v. Walker*, 9 Mees. & Welsb. (Ex.) 506.

<sup>3</sup> *Rowe v. Young*, 2 Brod. & Bing. 165; s. c. 2 Bligh, 391.

<sup>4</sup> *Piquet v. Curtis*, 1 Sumn. (Cir. Co.) 478.

<sup>5</sup> The 123d article of the French Code of Commerce, and also article 173, and article 184, which, in the judgment of the learned judge, showed "that there is no default in the acceptor, which puts him *in mora*, or default, until a demand and protest at the place of payment."

<sup>6</sup> *Pickard v. Valentine*, 1 Shep. (Me.) 412; [Kimball v. Fuller, 13 La. Ann. 602.]

100. In the case of the payment of a bill by an accommodation acceptor, the statute, it was held, runs from the time of payment, and not from the time when the bill became due. But where the payee and indorser of a promissory note, who indorsed it for the accommodation of the maker, and *without any consideration* between them, and who afterwards was compelled to pay the amount to the holder, it was held, he cannot recover from the maker on any of the *money counts* in *indebitatus assumpsit*, but must sue on the note. And, if more than six years have elapsed between the time at which the note fell due and the commencement of the action, he cannot recover, although he may have paid the amount to the holder within six years.<sup>2</sup>

101. Where goods were sold on six months' credit, payment to be *then* made by a bill at two or three months, at the option of the purchaser, it was held that the statute began to run at the end of nine months from the sale. Parke, J., was, however, inclined to think, on the ground of the option given to the purchaser, as to the length of the bill, that the contract was really for a six months' credit, payable in a bill at the expiration of that time, so that the statute would commence running after six months.<sup>3</sup>

102. After a promissory note had been for some time due, an indenture was executed between the maker and his creditors, by which he assigned his property in trust for such of his creditors as should become parties to the indenture; and the creditors covenanted to discharge him from all claim on demand. Held, that this indenture did not suspend the operation of the statute as to the note.<sup>4</sup>

103. Where a note was not to be delivered to the payee until certain conditions should be performed, it has been held that the statute does not run till the delivery of the note.<sup>5</sup>

<sup>1</sup> Reynolds v. Doyle, 2 Scott (N. P.), 45.

<sup>2</sup> Kennedy v. Carpenter, 2 Whart. (Penn.) 344; [Woodruff v. Moore, 8 Barb. (N. Y.) S. C. 171]. And see Hoyt v. Reed, 2 Black. (Ind.) 369. [But held otherwise in Bullock v. Campbell, 9 Gill, 182, and that the statute begins to run, not from the date of the note, but from the payment of the money by the indorser.]

<sup>3</sup> Helps v. Winterbottom, 2 Barn. & Adol. 431. [But where goods were alleged to have been bought on a year's credit, and the evidence was, that this credit was a custom of the merchant to indulge his customers with credit for one year, it was held that the case was not taken out of the statute of limitations. Brent v. Cook, 12 B. Mon. (Ky.) 267.]

<sup>4</sup> Harvey v. Tobey, 15 Pick. (Mass.) 99.

<sup>5</sup> Savage v. Aldren, 2 Stark. 232.

104. Upon a promissory note overdue, the currency of the statute may be suspended by an agreement between the maker and the payee. Thus, where the defendant was indebted to the plaintiffs in a balance of £2,245, for which they held his overdue promissory note, and, in 1827, it was agreed between the parties that the defendant should pay the balance as follows; namely, £245 in cash, and the remainder by annual payments of £300 a year out of his salary, as a consul abroad, and by the proceeds of certain wines consigned by him to India, and that the plaintiffs should hold his promissory note as a security for the payment of the account, — £245 was paid, and the £300 was also paid in 1828 and in 1829. It was held, that the plaintiffs were entitled at any time within six years from September, 1830, to sue the defendant on the promissory note, or for the balance remaining due on a count upon an account stated.<sup>1</sup>

105. The payee upon a bill or note may recover thereon for money lent, although six years have elapsed since the actual advance of the money; the statute in such case not beginning to run until the bill or note becomes due.<sup>2</sup>

106. The payee of a note sold it before it was due, affirming the maker to be solvent; and afterwards the purchaser sued the seller, in consequence of the maker's insolvency, to recover back the money paid for the note. It was held, that if the time limited by the statute had elapsed from the time the note became due, before the commencement of the suit, the statute might be pleaded.<sup>3</sup>

<sup>1</sup> *Irving v. Veitch*, 3 Mees. & Welsb. (Ex.) 90. [But in a recent case in the Privy Council, where the parties entered into an agreement to go into an inquiry as to the amount of damage for an admitted breach of contract, and through the defendant's fault the inquiry was prolonged so far that action was not brought until more than six years after the original breach of contract, and the plaintiffs contended that the agreement had the effect to suspend the running of the statute, Lord Campbell said that, notwithstanding the "extreme hardship" of the case, and his disposition to aid the plaintiff, yet it was "the duty of courts of justice to take care, for the general good of the community, that hard cases do not make bad law;" that "the rule is firmly established, that in assumpsit the breach of contract is the cause of action, and that the statute runs from the time of the breach even when there is fraud on the part of the defendant;" and that no authority had been, or could be, cited to support the plaintiff's proposition. *The East India Company v. Paul*, 1 Eng. L. & Eq. 44; s. c. 14 Jur. 258.]

<sup>2</sup> *Wittersheim v. Countess of Carlisle*, 1 H. Bl. 631.

<sup>3</sup> *Hoyt v. Reed*, 8 Black. (Ind.) 368.

107. In Massachusetts, the statute does not apply to promissory notes which are *witnessed*; unless they are made negotiable, and have been transferred.<sup>1</sup> And if the original promisee of such a note, after six years, transfers it, the note is put upon a footing with notes not witnessed; that is, the statute will begin to run against the indorsee from the time of the transfer.<sup>2</sup> Where a witness attests the signature of one maker of a promissory note, and another maker afterwards signs it, it seems that it is not an attested note as to the latter, within the provision of the statute of limitations of Massachusetts, of 1786.<sup>3</sup> A person who sees the promisor of a note sign it has no right at another time to subscribe his name as a witness, without the knowledge or consent of the

<sup>1</sup> See Stat. of Massachusetts, *Personal Actions*, sect. 4, App. p. 1. [And it makes no difference that the maker of the note is an infant. *Earle v. Reed*, 10 Met. (Mass.) 387. Or that the note is not negotiable. *Sibley v. Phelps*, 6 Cush. (Mass.) 172. But it must be payable in money. *Dennett v. Goodwin*, 82 Me. (2 Red.) 44. Held otherwise, however, in Vermont. *Bragg v. Fletcher*, 20 Vt. (5 Washb.) 851.]

<sup>2</sup> *Frye v. Barker*, 4 Pick. (Mass.) 884. [So where a debtor gave to his creditor a note, attested by a witness, and payable to a bank, and the creditor sold the note to a third person, who kept it fifteen years, and till after the death of the maker, and then brought an action upon it for his own benefit, but in the name and by the authority of the bank against the maker's executors, it was held, that there was never any contract between the plaintiff (the bank) and the payee, and that the note did not come within the statutory exemption of witnessed notes. *Village Bank v. Arnold*, 4 Met. (Mass.) 587. But where the payees of a witnessed note, more than six years after the same fell due, became bankrupt, and the note was sold by the assignee at auction and purchased by one of the payees, to whom it was transferred by delivery merely, it was held, that such payee might maintain an action on the note in the name of both payees, for his own benefit, under the statute as to witnessed notes. *Drury v. Vannevar*, 5 Cush. (Mass.) 442. See also *Rockwood v. Brown*, 1 Gray (Mass.), 261; *Pritchard v. Chandler*, 2 Curtis, C. C. 448. And so also may the holder of such a note maintain an action thereon for his own benefit in the name of the administrator of the payee, provided he consent, after the expiration of six years from the time when the cause of action accrued. *Sigourney v. Severy*, 4 Cush. (Mass.) 176. And a witnessed note continues to be saved by the statute in the hands of the assignee of an insolvent debtor, or the indorsee or assignee of such an assignee. *Pitts v. Holmes*, 10 Cush. (Mass.) 92. In Maine, the statute of limitations does not bar a witnessed note, sued in the name of the indorsee, though the indorsement be made more than six years after the pay-day of the note. *Stanley v. Kempton*, 30 Me. 118.]

<sup>3</sup> *Walker v. Warfield*, 6 Met. (Mass.) 466. [And if, after the note has been signed by the maker in the presence of an attesting witness, it is signed on the back by another person not in the presence of the witness, but in pursuance of an original agreement to that effect, it is not, as to the latter, an attested note. *Stone v. Nichols*, 18 Shep. (Me.) 49. The attesting witness must be one at the time competent to testify to the same facts in court. *Jenkins v. Dawes*, 115 Mass. 599.]

promisor; and, therefore, his subsequently putting his name as a witness will not bring the note within the exception in regard to witnessed notes.<sup>1</sup> An indorsement on a promissory note acknowledging it to be due, signed by the promisor, and attested by a witness, is not an attested promissory note within the meaning of the revised statutes in Massachusetts, extending the limitation of actions upon such notes to twenty years.<sup>2</sup> But a memorandum written on a note by the maker in these words, "For value received, I hereby acknowledge this note to be due, and promise to pay the same on demand," and signed in the presence of an attesting witness, is itself a "promissory note" within those revised statutes; and an action thereon is not barred by the statute.<sup>3</sup>

108. The statute of Maine, of 1838, in addition to the limitation act of 1821, extending to an indorsee the same right to sustain an action upon a negotiable note, attested by a witness, or by witnesses, after six years from the time of action accrued, which is given to the original promisee by the tenth section of the statute of 1821, applies to an action on a witnessed note held by an indorsee at the time the act of 1838 was passed.<sup>4</sup>

<sup>1</sup> *Smith v. Dunham*, 8 Pick. (Mass.) 246. [In order to constitute an attestation of a note, within the statute, the witness must put his name to it openly, and under circumstances which reasonably indicate that his signature is with the knowledge of the promisor, and is a part of the same transaction with the making of the note. *Drury v. Vannevar*, 1 Cush. (Mass.) 276; and in the presence of all the signers of the note. *Lapham v. Briggs*, 1 Wms. (Vt.) 26. But where the maker of the note procured it to be attested nearly six years after its date, it was held, that such attestation gave the paper the legal character of a witnessed note. *Boody v. Lunt*, 1 App. (Me.) 72. And see also *Swazey v. Allen*, 115 Mass. 594. A defendant who signs a note, already signed by others to whose signatures there is an attesting witness, may plead the statute. As to him the note is not a witnessed note. *Trustees, &c. v. Rowell*, 49 Me. 330.]

<sup>2</sup> *Gray v. Bowden*, 28 Ib. 282. [Nor does the statute apply to a note when the action is brought by the first indorsee, the note being made payable to the promisor's own order, and by him signed and indorsed in blank, at the same time, in the presence of a person who puts his name thereto, as a witness to the signature on the face of the note, but not to the indorsement. *Kinsman v. Wright*, 4 Met. (Mass.) 219. And if the note is both signed and indorsed in the presence of an attesting witness, and transferred by the maker by delivery to A, who afterwards transfers it to B, and B brings an action upon it, the note, as against him, is barred, he not being the original payee. *Houghton v. Mann*, 13 Met. (Mass.) 128.]

<sup>3</sup> *Commonwealth Ins. Co. v. Whitney*, 1 Met. (Mass.) 21.

<sup>4</sup> *Quimby v. Buzzle*, 4 Shep. (Me.) 470. See sect. 7, Stat. Maine, App. p. xxxiii. The limitation of witnessed notes in Vermont is fourteen years. App. p. xli. [Part



109. Connected with a right of action in respect to the making and transfer of notes and bills is the offence of *usury*. To entitle a person to a moiety of the penalty for usury, it must appear on the record that he prosecuted, complained, or sued for it, within the time prescribed by the statute for the commencement of process in such cases. Therefore, where the offence for which the penalty is demanded was alleged and proved to have been committed on the fourteenth day of October, 1807, and the bill was found by the grand jury, in November, 1808, it was held, that whatever interest the complainant might have had, it was lost to him at the commencement of the prosecution; more than one year, the time limited, having elapsed. The doctrine is, that when the usurious contract, the lending, and forbearance concur, the offence is committed, and the limitation runs from that time, and not from the payment of the money borrowed to the lender.<sup>1</sup> A lent B £500, and at the time of the loan it was agreed that the latter should give something more than legal interest as a compensation, but no particular sum was specified. After the execution of the deed, B gave A £50, and paid interest at the rate of £5 per cent on the £500 for five years; at the end of which time a *qui tam* action was brought against A for usury. It was held, that the action was not barred by lapse of time, for that the loan was substantially for no more than £450, and consequently the interest at the rate of £5 per cent on the £500 received within the last year was usurious.<sup>2</sup>

payment of such a note within twenty years renews it for twenty years from the payment. *Estes v. Blake*, 80 Me. (17 Shep.) 164; *Lincoln, &c. v. Newhall*, 88 Me. (8 Heath), 179; *Howe v. Saunders*, *Ib.* 350.]

<sup>1</sup> *Commonwealth v. Frost*, 5 Mass. 53; *Wade qui tam v. Walton*, 1 East, 195. The cause of action is consummate *eo instanti* the usury is paid. *Breckenridge v. Churchill*, 3 J. J. Marsh. (Ky.) 15.

<sup>2</sup> *Scurry qui tam v. Freeman*, 2 Bos. & Pul. 381. Other cases of usury, *Lloyd, qui tam v. Williams*, 8 Wils. 250; *Fisher qui tam v. Beasley*, Dougl. 235. [Usurious interest, paid more than one year before the action is brought, cannot be recovered back. *Pierce v. Conant*, 25 Me. (12 Shep.) 83. The statute begins to run from the time of actual payment, and not from the time of the agreement to pay. *Rushing v. Rhodes*, 6 Ga. 228; *Davis v. Converse*, 85 Vt. (6 Shaw) 503. But usury paid on a note, itself paid by renewal, may be set off in an action on the renewed note. *Hayes v. Goodwin*, 4 Met. (Ky.) 80. And see *ante*, § 75, note. Where the delivery of personal property from the borrower to the lender is a part of a usurious transaction, the possession of such property, the usurious contract being void, by the lender, is tortious from the beginning; and, as trover will immediately lie for the property, if the action is not brought within six years from the delivery it is barred by the statute of limita-

tions. *Schroeppel v. Corning*, 5 Denio (N. Y.), 236. But Whittlesey, J., dissented, and thought the possession of the property was not tortious. *Ibid.* Where separate notes are given for money loaned, and for usurious interest thereon, and the latter is first paid, the payment will be considered as on account of the legal debt, and the right to recover back money paid as usury will not accrue until the principal note is paid, and the statute of limitations will not begin to run till that time. *Booker v. Gregory*, 7 B. Mon. (Ky.) 439. In France the lender does not acquire the right to retain his usurious interest by lapse of time. It is there held that a man cannot prescribe against good morals or public policy. And the law will not authorize a person to retain or confirm him in the possession of that which it prohibited him from taking. Troplong, *Com. sur la Prescription*, n. 132.]



## CHAPTER XII.

## MISCELLANEOUS SIMPLE CONTRACTS.

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|--|---|
| 1. Money payable by instalment.          | 7. Postponement of right of action.   |
| 2. Conditional promises.                 | 8. Money paid by one of several co-tenants,<br>co-purchasers, and co-contractors. |
| 3. Liability depending on a contingency. | 9. Promises of indemnity.   |
| 4. Money paid by mistake.                | 10. Money paid by a surety on account of<br>the principal.                        |
| 5. Failure of consideration.             |   |
| 6. Continuation of services.             |   |

1. *Money payable by Instalment.*

110. WHEN a debt is payable at several times, that is, by instalment, the time begins to run from the expiration of the first term, for the part then payable; and for the other parts, only from the day of the expiration of the respective terms of payment.<sup>1</sup> Thus, under an act of the legislature of Maryland, incorporating a turnpike company, the shares subscribed for were to be paid for in several instalments at different times; and it was held that the statute of limitations attached to each one as it became due.<sup>2</sup>

111. But, where a sum is payable by instalments, and there is a stipulation that, upon default, all shall become due, the statute

<sup>1</sup> 1 Evans's Pothier, 404. Under such circumstances, the courts would very probably be disposed to favor every implication of an acknowledgment extended to the time of the latest payment. Ibid. [Where an officer is elected for a year, with a salary fixed at a certain sum per month, the statute does not begin to run till the end of the year. *Rosborough v. Shasta Rivers*, 22 Cal. 556.]

<sup>2</sup> *Baltimore, &c. Turn. Co. v. Barnes*, 6 Harr. & J. (Md.) 57. [*Burnham v. Brown*, 10 Shep. (Me.) 400; *Bush v. Stowell*, 71 Pa. St. 208. Where a man subscribed for shares in a stock company, and paid the cash to an agent of the company, who died without transmitting, and eleven years after the company declared the stock forfeited, it was held that the statute did not begin to run till the declaration of forfeiture. *Rice v. Pacific R. R. Co.*, 55 Mo. 146. But where a commissioner sold slaves on a credit of one, two, and three years, titles to be made on the payment of the first instalment, with a reservation of the right to sell again on non-payment by the purchaser, and at his risk, and the slaves were delivered, it was held, that the statute began to run in favor of the purchaser on his failure to pay the first instalment. *Singleton v. Heriott*, 8 Rich. (S. C.) 321. That where interest is payable annually, the statute does not begin to run till some part of the principal is due, see *Grafton Bank v. Doe*, *Henderson v. Hamilton*, and *Ferry v. Ferry*, cited *ante*, § 95, n. And see *post*, § 140.]

runs as to the whole demand from the time of default made. In *Hemp v. Garland*,<sup>1</sup> the declaration stated that in 1832, defendant, being indebted to plaintiff in £330, gave a warrant of attorney for the amount, subject to a defeasance, stating that the warrant was given to secure payment of the above sum by instalments, the last of which was payable in 1835; and that, in case default should be made in payment of any of the instalments, the plaintiff should be at liberty to enter up judgment and issue execution, levy, recover, and receive all or so much of the debt as should be unpaid at the time, the same as if all the periods of payment had expired by effluxion of time. And thereupon, in consideration that the plaintiff would forbear until the time specified in the defeasance, defendant promised to pay the instalments at the times mentioned. The declaration then stated that plaintiff forbore, and alleged non-payment of some of the instalments. Plea, statute of limitations and issue thereon. It appeared at the trial, that the first default in payment of an instalment was made more than six years before action. It was held, that the plaintiff might have sued on the first default for the whole amount remaining unpaid, and that therefore the statute was a bar to all the instalments.

112. In assumpsit on a parol promise to guarantee the payment of a mortgage payable by instalments, it was held that the statute is to be considered as running only from the year after the last instalment became due.<sup>2</sup>

## 2. Conditional Promises.

113. While a promise is suspended by a *condition*, the statute does not run from the time of making it; for no right of action accrues till the condition is performed, or the event stipulated for happens.<sup>3</sup> If A promises B to pay him a sum of money if he will

<sup>1</sup> *Hemp v. Garland*, 3 G. & Dav. 402 (Q. B.).

<sup>2</sup> *Overturn v. Tracy*, 4 Serg. & Rawle (Penn.), 311.

<sup>3</sup> 1 Evans's Pothier, 404; *Changeur v. Gravier*, 5 Mart. (Louis.) 545. [*Gueno v. Soumastre*, 1 La. Ann. 44; *Stewart v. Martin*, 12 Ib. 356. The statute runs from the time of the eviction in an action on the covenant of warranty. *Flowers v. Foreman*, 23 How. (U. S.) 132. If, in a contract to pay money on a condition, no time of payment or performance of the condition be fixed, the statute begins to run after the expiration of a reasonable time for payment. *Doe v. Thompson*, 2 Foster (N. H.), 217. The fact that an indorser of a note takes security of the maker, and receives demand and notice, does not have the effect to set the statute in motion before the maturity of the note. *Cockrill v. Hobson*, 16 Ala. 391.]

do a particular act, and B does the act, the promise becomes binding, although B, at the time of the promise, does not engage to do the act. In the intermediate time, the obligation of the promise is suspended. Until the performance of the condition of the promise, there is no consideration, and the promise is *nudum pactum*; but, on the performance of the condition by the promisee, it is clothed with a valid consideration, which relates back to the promise, and it then becomes obligatory.<sup>1</sup> Where a party promised by a writing signed to pay when he was able, the statute commences running from the time when he becomes able to pay, though the plaintiff knew not of his ability, as he was bound to inform himself upon the subject; and no demand is in such case necessary before bringing the action.<sup>2</sup>

114. But the condition must be clearly expressed; and, therefore, trustees, empowered to raise moneys under a local act had a meeting, and verbally ordered that money should be raised to pay the tradesmen; it was held (the plaintiff having done work for them), that the statute began to run from the time when the work was done, and not from the time when the trustees were in funds.<sup>3</sup>

### 3. *Liability depending on a Contingency.*

115. The commencement of a right of action may depend upon a *contingency*, or the happening of a certain event, or the ascertainment of what is uncertain. Where a note is payable when a certain mortgage, holden by the maker, shall be collected, a cause of action accrues when the mortgagee enters into possession by virtue of foreclosure. In judgment of law, the mortgage is then *collected*; and, unless a suit is brought upon the note within six years after the happening of the above events, the plaintiff will be barred.<sup>4</sup> Where the stockholders which should compose an insurance company, at the time of dissolution, were made responsible in their individual

<sup>1</sup> *Train v. Gold*, 5 Pick. (Mass.) 384. Also *Gardner v. Webber*, 17 Ib. 407.

<sup>2</sup> *Waters v. Tufton*, Earl of Thanet, Q. B., 20 L. J. 87 (Hilary, 1842); 2 G. & D. 166, cited in this manner in *Browne on Actions*, 70. And see *post* as to conditional new promises and acknowledgments, § 235 *et seq.*

<sup>3</sup> *Emery v. Day*, 1 Crompt. Mees. & Rosc. Ex. 245. [And where one of two parties in settlement pays a claim which he alleges has already been settled by giving up a certain note, and the other promised to refund the money if it was so, it was held, that the statute of limitations began to run from the time of the promise. *Durham v. Angier*, 2 App. (Me.) 242.]

<sup>4</sup> *Morgan v. Plumb*, 9 Wend. (N. Y.) 287.

and private capacities to the extent of their respective shares in the stock of the company, the statute did not commence running in favor of such stockholders, previous to the expiration of their charter.<sup>1</sup> In Maryland, all specialties are barred by an express statutory provision, at the end of twelve years, and it has been held, that where B. bequeathed a legacy to J., and the executor who paid it took J.'s bond, conditioned to refund it, or a ratable part thereof, in case of a deficiency of assets, upon request, — that the cause of action accrued, when the deficiency was ascertained, and that *therefore* the statute was no bar. It was, moreover, held unnecessary to prove a special request of J. to refund.<sup>2</sup> Where a subscriber for stock promised to pay in "such manner, at such times, and in such proportions, as shall be determined," &c.; the statute, it was held, did not begin to run until such determination and demand made, agreeably to the act of incorporation.<sup>3</sup> In an action for money had and received, in 1825, to recover the amount paid on an article, for the agreement for the sale of land, which was entered into between the parties in the year 1800, where nothing had been done by the defendant until 1824 which would entitle the plaintiff to rescind the contract, the statute was insufficient to bar the action.<sup>4</sup> In an action of *indebitatus assumpsit*, to recover the amount agreed to be paid by the defendant for owelty on a parol partition of lands, it was held that the legal title not having been completed until within six years before the commencement of the suit, the plaintiff's right of recovery was not barred.<sup>5</sup>

<sup>1</sup> Van Hook v. Whitlock, 8 Paige (N. Y.), Ch. 409. [A subscription to the stock of a railroad is barred by the statute, unless a call be made within the time limited, or the delay be satisfactorily accounted for. Pittsburgh & Con. R. R. Co. v. Graham, 2 Grant (Penn.), 259; Same v. Byers, 8 Carey (Penn.), 22; Same v. McCully, Ibid. 25. And see *ante*, § 96. If the obligation of the stockholder be intended to secure the payment of any loans effected by the company, the statute begins to run in favor of the stockholder at the maturity of the bonds issued by the company for its first loan. Haynes v. Wall, 18 La. Ann. 258; and see also Clinton & C. R. R. Co. v. Eason, 14 La. Ann. 816.]

<sup>2</sup> Salisbury v. Black's Administrator, 6 Harr. & Johns. (Md.) 298.

<sup>3</sup> Sinkler v. Indiana, &c. Turnpike Co., 8 Penn. 149; [*ante*, § 96, n.].

<sup>4</sup> Leinwart v. Forringer, 1 Penn. 492.

<sup>5</sup> Walter v. Walter, 1 Whart. (Penn.) 292. That the statute is suspended until the contingency happens, see also Administrators of M'Dowell v. Executors of Grodmyn, 2 Const. (S. C.) 441; Painter v. Smith, 2 Root (Conn.), 142. [Quigg v. Kitteridge, 18 N. H. 187; Nimmo v. Walker, 14 La. Ann. 589; Copse v. Eddins, 15 Ib. 528. The cause of action accrues on an agreement to devise, on the death of the promisor. Bash v. Bash, 9 Barr (Penn.), 260; Quackenbush v. Elde, 5 Barb. (N. Y.) S. C. 469. And where A promised to pay money to his sister at the death of their father, it was

#### 4. *Money paid by Mistake.*

116. Whenever money has been paid by mistake, or more is paid than ought to have been paid, the error may be corrected any time within six years therefrom, and the excess recovered back, provided the mistake is of a character by which the law does not hold the party paying concluded. But if the party, so paying by mistake, "sleep upon his rights" until the statute attaches, no inquiry can then be had (without a sufficient acknowledgment) into

held that the statute began to run from his death. *Thompson v. Gordon*, 8 Strobh. (S. C.) 196. So where a farm is conveyed to the son on condition to support his father and mother for life. The mother dies, and the father marries a second wife. The son is told by the father to bring in his bill for the support of the second wife against the father's estate. The statute runs against no part of the son's claim till the death of the father. *Sprague v. Sprague*, 80 Vt. (1 Shaw) 488. So where it was agreed between the maker and the holder of a note, that the maker should keep it till his liability as bail for the holder ceased, it was held that the statute began to run, not from the time of making the agreement, but from the cessation of the maker's liability as bail. *Bowles v. Elmore*, 7 Gratt. (Va.) 385. And where a judgment is confessed for a sum to be ascertained by the clerk, the statute does not begin to run till the sum has been so ascertained. *Wills v. Gibson*, 7 Barr (Penn.), 154. A note payable in stone work at any time when called for is not due till the work is called for. *Lincoln v. Purcell*, 2 Head (Tenn.), 148. But a demand depending upon the rectification of a mistake by a court of chancery is not a demand depending upon such a contingency as to postpone the operation of the statute of limitations till the rectification. *Jones v. Lightfoot*, 16 Ala. 7. And where B was to pay A a certain sum in case he succeeded in a suit in chancery, but died before the suit was determined, it was held that the statute of limitations began to run when the suit was determined, and not when an administrator was appointed. *Burton v. Lockert*, 4 Eng. (Ark) 411. But if the attorney's fee is contingent upon his collection of the money, and is to be paid out of it, the statute does not begin to run at the determination of the suit. *Morgan v. Brown*, 12 La. Ann. 159. A agreed to pay money on demand, provided the demand should not be made until a certain event. By his own act he postponed the happening of that event. Held, that he could not take advantage of a lapse of time which was caused by his own act. *Emmons v. Hayward*, 6 Cush. (Mass.) 501. The statute, as against a legatee who brings his action against the executor to account, is not suspended by the fact that the legacy is conditional, and depends upon the liquidation of the estate to determine its amount. *Deranco v. Montgomery*, 13 La. Ann. 513. A reward offered for evidence leading to the conviction of the offender is not payable till conviction. *Ryer v. Stockwell*, 14 Cal. 184. Deposits in a bank are not payable till after demand. *Girard Bank v. Bank of Penn. &c*, 87 Penn. St. 92; *Fells Point Savings-Bank v. Weeden*, 18 Md. 820. So of money deposited with an agent to be invested, and to be accounted for on demand. *Baker v. Joseph*, 16 Cal. 173. And of money deposited with a private banker on interest. *Payne v. Gardiner*, 29 N. Y. (2 Tiff.) 146; *Same v. Slate*, 89 Barb. (N. Y.) 634. But, in case of a loan of money payable on demand, the statute begins to run from the time of the loan, unless demand is agreed upon. *Cook v. Cook*, 19 Texas, 484. And see *post*, § 182, note.]

any account between the parties, prior to the settlement.<sup>1</sup> Where a personal representative, having found a mortgaged deed among the testator's papers, assigned it, and it turned out to be a forgery, it was held, that the assignee could not recover back from the assignor his money, the assignment having taken place more than six years, though the discovery that it was a forgery was made within that time ; and it not appearing that the assignor knew it to be a forgery.<sup>2</sup> The statute was held to be a bar by the Supreme Court of the United States, in a case where, at the time of the return of a bill of exchange (payable in New Orleans, and drawn in Kentucky, protested for non-payment), the parties to it, in 1819, having paid *as damages* on the bill ten per centum on the amount, and did not until 1827 claim, that, by the law of Kentucky, no damages were payable on such a bill.<sup>3</sup>

### 5. *Failure of Consideration.*

117. If money be paid upon an existing consideration, which afterwards fails, the statute does not run against the right to recover it till such event. Thus, where money was paid on the

<sup>1</sup> Clark v. Dutcher, 9 Cow. (N. Y.) 674. [Steele v. Steele, 25 Penn. (1 Casey) 164.]

<sup>2</sup> Bree v. Holbrook, Doug. 654 ; [Hunt v. Burk, 22 Ga. 129].

<sup>3</sup> Bank of the United States v. Daniels, 12 Peters (U. S.), 32. Bills drawn, accepted, and indorsed by citizens of Kentucky, and there negotiated, payable at a place in another State, are not, by force of the statute of Kentucky giving damages on protested bills, subject to the payment of damages. Ibid. [Where an executor voluntarily paid over an amount to a legatee, and ten years afterwards alleged he had overpaid, and brought a suit to recover back the excess, it was held that he was barred by the statute of limitations. Shelburne v. Robinson, 8 Gilm. (Ill.) 597. And where an overpayment was made on account of work done on a contract, and, on a final settlement, the balance was paid, it was held, that the statute began to run against a claim for the excess paid, from the final settlement. A had a claim against an intestate estate for \$150, which was paid by the administrator, part in 1849 and part in 1850. Afterwards the administrator discovered that A in 1847 bought a horse of the intestate for \$100, which sum had not been paid or credited. In an action by the administrator to recover back the money paid by mistake, it was held that the statute began to run only from the time when A wrongfully received the money. Gamble v. Hicks, 27 Miss. (5 Cush.) 781 ; Johnson v. Rutherford, 10 Barr (Penn.), 455. And where an administrator, in the belief that the estate was solvent, paid a claim against it in full, but the estate was afterwards declared insolvent, the right to recover back the overplus was held to accrue at the time when the estate was declared insolvent. Richards v. Nightingale, 9 Allen (Mass.), 149. But in cases of mistake as to the quantity of land sold, the statute does not begin to run till the mistake is discovered, or it ought to have been discovered. Grundy v. Grundy, 12 B. Mon. (Ky.) 269.]



promise of an intestate to convey an estate, and the intestate died before a conveyance, and the statute of limitations was pleaded, it was held, that the action did not accrue when the money was paid, but at the death of the intestate, he having his lifetime to convey the land.<sup>1</sup> So, where the plaintiff, as administrator, had paid the defendant the whole of his debt, upon the supposition that the estate was solvent, which proved to be insolvent, it was decided, that the cause of action arose when the insolvency was ascertained, and not when the money was paid.<sup>2</sup> So, where two persons had been appointed guardians of a spendthrift sold without sufficient authority his real estate, and credited him with the proceeds, which were applied to the payment of his debts, and the guardianship was afterwards revoked, and the spendthrift and his heirs avoided the sales of the real estate, and thereupon the guardians were compelled to refund the money paid by the purchasers, — it was held that the guardians had a right of action against the spendthrift's administrator for the amount refunded; and that this right did not accrue until the sales were avoided and the money refunded, so that the statute of limitations began to run from that time, and not from the time of settling the guardianship accounts.<sup>3</sup> So, where an executor paid the amount of a legacy, and took from the legatee a bond conditioned to refund the legacy, or a ratable part thereof, if a deficiency of assets should actually happen, after request should be made; and there being a deficiency of assets, and the estate overpaid by the executor, he brought an action on the bond against the legatee, who pleaded the statute. It was held, that, as the cause of action first accrued when the deficiency was ascertained, the statute was no bar.<sup>4</sup> It having been ascertained by the judgment in an action by an assignee on a bond assigned, that the bond had been discharged before notice of the assignment, by payments to, and set-offs against, the assignor, it was held, in an action by the assignee against the assignor, that the statute began to run at the rendition of the judgment in the action on the bond, — since the set-offs might never have been claimed by the obligor, and it was only the judgment that fixed them as payments.<sup>5</sup> An action was brought for money had and

<sup>1</sup> *Eames v. Savage*, 14 Mass. 425.

<sup>2</sup> *Walker v. Bradley*, 8 Pick. (Mass.) 26.

<sup>3</sup> *Shearman v. Atkins*, 4 Ib. 283.

<sup>4</sup> *Salisbury v. Black's Administrator*, 6 Harr. & Johns. (Md.) 293.

<sup>5</sup> *Scates v. Wilson*, 6 Leigh (Virg.), 478.

received, to recover back the consideration-money of a void annuity granted by the defendant to the plaintiff more than six years before the action, but which had, within six years, been treated by the grantor as a subsisting annuity, though afterwards avoided at his instance; and the court held, that the statute did not begin to run until the annuity had been avoided.<sup>1</sup>

118. The plaintiff, in a case, being in the possession of certain land, claimed by certain proprietors, for whom the defendant assumed to act as agent, paid to the defendant a sum of money and received a deed, the defendant affirming that the title of the proprietors extended so as to include the land. Within six years

<sup>1</sup> Cowper v. Goodwin, 9 Bing. 748; s. c. 28 Eng. Com. Law, 252. [The law implies a warranty of title in the vendor of a chattel, which is broken immediately if he have no title, and the statute begins to run from the time of sale. Chancellor v. Wiggins, 4 B. Mon. (Ky.) 201. But it was held, in Tennessee, that the purchaser of slaves had no right of action against his vendor for breach of warranty of title, until a recovery by a third person, who claimed them of the purchaser. Caplinger v. Vaden, 5 Humph. (Tenn.) 629. So in California, Gross v. Kiercke, 41 Cal. 111. In an action for breach of warranty of soundness, the statute runs from the date of the contract. Baucum v. Streater, 5 Jones (N. C.), L. 70. And see also *post*, § 186. B. sold W. a tract of land, and a deed was executed at the time of sale, but left in the vendor's possession. W. paid part of the purchase-money, but afterwards failed, and upon B.'s offering him a deed, W. declined, on the ground of inability to pay the balance due in compliance with the terms of the contract. B. then declared the contract at an end, went on to improve the premises, and refused to pay back the purchase-money received. On an action for specific performance, it was held that B., by refusing to refund the money, kept the contract open, and that the statute of limitations was no bar to W.'s recovering the amount paid. Bowles v. Woodson, 6 Gratt. (Va.) 78. The vendee of land, by virtue of articles under seal, assigned the same to the plaintiff, and agreed to give him receipts which *would bring a deed from the vendor*. If receipts are given which *entitle* the plaintiff to a deed, and he continues in possession, he cannot rescind and recover back his purchase-money, because the vendor refuses to convey. But if he could, the statute of limitations would begin to run on the right to recover back the purchase-money of the assignment, from the refusal of the vendor to convey, and would not be suspended by the subsequent declarations of the vendee, that the receipts which he had delivered would produce a deed. Stewart v. Keith, 12 Penn. St. (2 Jones) 288. The vendor of land left a part of the purchase-money in the vendee's hands to secure him against an outstanding lien. Subsequently the vendor paid the lien, and sued more than six years after the sale to recover the unpaid purchase-money, — held, that he could not recover on the agreement, but might on a count for money had and received. Evans v. Lee, 28 Penn. St. (11 Harris) 88. Where a vendor, after receiving the purchase-money of the vendee who goes into possession, afterwards conveys to another vendee, the first vendee may bring his action to recover for breach of the contract within the time limited after the agreement to convey to the second vendee. Up to that time there was a continuing promise to pay to the first vendee. Harris v. Harris, 70 Pa. St. 170.]



prior to the commencement of the plaintiff's action, but more than six years after the payment of the money and delivery of the deed, it was ascertained that the title of the proprietors was not so extensive as to cover the land in question. It was thereupon that the plaintiff brought his action to recover back the purchase-money and interest. In this case, it was held, that, if the plaintiff ever had a right to recover back the consideration, it was when the deed was made and delivered to him, the proprietors at that time having no title to the land therein described, and there was no ground of fraudulent concealment on the defendant's part.<sup>1</sup>

119. Where money has been paid upon a parol contract for the conveyance of real estate, there being no time appointed for executing the conveyance, no action accrues to him who paid the money to recover it back, on the ground of the failure of consideration, until he has demanded a deed, or until the decease of the other party.<sup>2</sup>

#### 6. *Continuation of Services.*

120. Where there is an undertaking which requires a *continuation of services*, the statute does not commence running until they can be completed. Thus, it has been held, that the statute does not commence running against the claim of an attorney at law for professional services, so long as the debt which he seeks to recover for his client remains unpaid. A mere suspension of proceedings, observed the court, from an apprehension that nothing might be got, would be a dangerous ground of inference; for, how desperate soever the affairs of a debtor may seem, it is always impossible to say how soon they may be retrieved; and, if money were subsequently lost for want of pursuit, the attorney might be liable for it.<sup>3</sup> The contract of an attorney to carry on or defend a suit is

<sup>1</sup> *Bishop v. Little*, 8 Greenl. (Me.) 405. [The heirs of A, at his death in August, 1833, agreed verbally to make an equal division of the estate, which was done. The part allotted to B being of less value than that allotted to C, it was made a part of the same agreement that C should pay to B \$50. Deeds were immediately executed, but B's deed being invalid, nothing further was done until May, 1837, when B gave a valid deed. In May, 1838, B sued C in assumpsit for the \$50, and it was held, that, as the right of action did not accrue against C until the delivery by B of the valid deed, the statute of limitations of three years was no bar. *Baxter v. Guy*, 14 Conn. 119.]

<sup>2</sup> *Eames v. Savage*, 14 Mass. 425.

<sup>3</sup> *Foster v. Jack*, 4 Watts (Penn.), 334; [*Jones v. Lewis*, 11 Texas, 359. If a case

an entire contract to manage a suit to its close, and therefore the time runs only from the termination of the proceedings.<sup>1</sup>

### 7. *Postponement of Right of Action.*

121. The liability to be sued, and consequently a right of action, may be *suspended by a particular enactment*. By one of the provisions of an insolvent law, if a certain number of creditors should so agree in writing, it should be lawful for the court to make an

be continued *nisi*, and judgment be entered in vacation, the statute runs from the entry of judgment. *Elliot v. Lawton*, 7 Allen (Mass.), 275. If judgment be received, the statute does not run until the relation of attorney and client ceases. *Lichty v. Hugen*, 55 Penn. St. 484.]

<sup>1</sup> *Rothery v. Mannings*, 1 Barn. & Adol. 15; *Harris v. Osborn*, 2 Carr. & Marsh. (N. P.) 829. Working "by the job," is understood among workmen to be the doing of the whole of a thing which is to be done, and it is employed in this sense in the civil code of Louisiana. Bouv. Dict. Tit. *Job*. Decided accordingly in reference to the statute of limitations, in *Teigler v. Hunt*, 1 McCord (S. C.) 578; [*McKenney v. Springer*, 8 Ind. 59; *Walker v. Goodrich*, 16 Ill. 841; *Mygatt v. Wilcox*, 45 (N. Y.) 806; *Adams v. Fort Plain Bank*, 36 N. Y. 255; *Phelps v. Patterson*, 25 Ark. 185. If by advice of the attorney the client consent to an abandonment of the suit, the service ends then and the statute begins. Negligently suffering the action to remain on the docket will not prolong the right to sue. *Bathgate v. Hoskin*, N. Y. C. C. P. Gen. Term, Jan. 1874. The statute bars a claim for services not relative to the particular suit, though rendered during the pending of the suit. *Hale's Ex'rs v. Ard's Ex'rs*, 48 Penn. St. 22. Where costs are incurred in a suit, the statute of limitations does not begin to run against the earlier items until the suit is terminated. *Martindale v. Faulkner*, 2 C. B. 70. And see *Whitehead v. Lord*, 11 Eng. Law & Eq. 589. But where an attorney was employed to raise money on a mortgage, and by direction of his employer applied to several persons for that purpose, and communicated from time to time with the defendant, it was held, that the business could not be taken to be done under one contract, so that the last item in plaintiff's bill, which was within six years, would take the others out of the statute. *Phillips v. Broadley*, 11 Jur. 284; s. c. 16 L. J. Q. B. 72. On an indefinite hiring of a slave, neither the time when the hiring is to terminate, nor the amount of compensation, nor the time when payable being agreed upon, the hiring is payable when earned, or within reasonable time thereafter, and the service is not a continuous one, so as to take the earlier wages out of the statute. *Mins v. Sturtevant*, 18 Ala. 359. See also *Davis v. Gordon*, 16 N. Y. (2 Smith) 255. But *contra*, *Littler v. Smiley*, 9 Ind. 116. The statute is no bar to a suit for labor performed more than six years before action brought, if under a contract which had not expired till within six years. *Vanhorn v. Scott*, 28 Penn. St. (11 Harris) 316. If extra work be done in the performance of a contract, the statute runs from the completion of the extra work. *Peck v. N. Y. Steamship Co.*, 5 Bosw. (N. Y.) 226. And where a contract to do a thing contemplates the allowance of a reasonable time therefor, the statute does not till then begin to run; and the question of reasonable time is for the jury. *Evans v. Harde-man*, 15 Texas, 480. A promise to keep house for one until his death is not executed till the death; and the statute runs only from that time. *Schach v. Garrett*, 69 Pa. St. 144; *Jilson v. Gilbert*, 26 Wis. 687.]

order, that the debtor shall be released from all suits, and the property which he might afterwards acquire be exempted from execution for any debt contracted, or cause of action created, previous to such release, for the period of seven years thereafter; and it was held that the statute of limitations did not begin to run during the seven years allowed to the debtor.<sup>1</sup>

122. Where money is paid on a contract which is to remain open, the statute does not run until one of the co-contractors authorizes the other to dispense with the contract. In an action for money had and received, brought in 1825, to recover the amount paid on an article of agreement for the sale of land, and which was entered into between the parties in the year 1800, where nothing had been done by the defendant until 1824, which would entitle the plaintiff to rescind the contract, the statute, it was held, was insufficient to bar the action. Unquestionably, said the court, the plaintiff might renounce the contract, after it had been repudiated by the defendant.<sup>2</sup>

8. *Money paid by one of several Co-tenants, Co-purchasers, and Co-contractors.*

123. In an action by one tenant in common against his co-tenant for the proceeds of trees sold, the statute begins to run from the time of the payment, and not from that of the sale; and, if a promissory note be taken from the purchaser, upon which payments are afterwards made, the statute begins to run from the times of the payments.<sup>3</sup>

124. If one *joint purchaser* pay the accruing interest on the purchase-money from time to time, a right of action for a moiety of each payment will arise instantly to the other joint purchaser, which will be barred by the lapse of the time limited by the statute, from the payment, before suit brought.<sup>4</sup>

<sup>1</sup> *Eckstein v. Shoemaker*, 3 Whart. (Penn.) 15. The provision of the insolvent law was deemed constitutional, because the intent was to *suspend* and not destroy the debtor's liability.

<sup>2</sup> *Leinhart v. Forringer*, 1 Penn. 492.

<sup>3</sup> *Miller v. Miller*, 7 Pick. (Mass.) 133. [Two distributees of an estate entered into an agreement by which one was to have a life-estate in both shares, and the other the remainder. It was held, that the statute of limitations did not begin to run against a suit brought by the remainder-man for property sold by the tenant for life, until the termination of such life-estate. *Paxton v. Rhea*, 8 Ired. (N. C.) Ch. 248.]

<sup>4</sup> *Campbell v. Calhoun*, 1 Penn. 140.

125. Where the liability of one joint maker of a promissory note is continued by partial payments within six years, but the remedy of the holder against the other is barred, the debtor who continues liable may, notwithstanding, recover a contribution from the other, when he has paid the debt.<sup>1</sup>

126. One partner may maintain *assumpsit* against his copartner for contribution, where he pays a partnership debt more than six years after a general assignment by the firm in trust for creditors, and the defendant gives no evidence to show that the partnership accounts are opened and unsettled.<sup>2</sup>

127. The complainant and defendant, in *Lomax v. Pendleton*,<sup>3</sup> had, at the request of one W., become indorsers of a set of bills of exchange, which he drew on a mercantile house in London; the *complainant*, also, indorsed other bills to a considerable amount; but, receiving information that the bills would be protested, he obtained a conveyance to himself *in trust* of the whole estate of W. for the payment of his debts. The bills were returned protested, and payment of them demanded from the complainant, who, in the year 1753 (the same year in which the bills were drawn, and returned protested), sold the whole estate on six months' credit, and was active in the collection of the debts. He discharged the debts due from W. in the order of priority mentioned in the deed, as the money came to his hands, and as he could spare it from his own estate. The whole debts were paid by the month of October, 1762. It then appeared that his payments had exceeded his receipts, and left him in advance for W. to a large amount, which must fall on the bills indorsed by the *complainant* and *defendant*, as that was the *last-mentioned* debt in the said deed. The trust estate was not closed till 1765. The complainant, owing to important engagements, did not apply to the defendant until some time in the year 1766; when he transmitted to the defendant an account claiming a moiety of the money paid

<sup>1</sup> *Peaslee v. Breed*, 10 N. H. 489.

<sup>2</sup> *Brown v. Agnew*, 6 Watts & S. (Penn.) 285. [The statute runs against an indorser who pays for the benefit of the maker of a note, from the time of the payment, whether partial or total. *Bullock v. Campbell*, 9 Gill, 182. So where money is advanced on a letter of credit, the statute runs from the advancement. *Regis v. Hebert*, 16 La. An. 224.]

<sup>3</sup> *Lomax v. Pendleton*, 3 Call (Va.), 542. [In an action for contribution, the statute begins to run from the time of payment. *Sherwood v. Dunbar*, 6 Cal. 58; *Buck v. Spofford*, 40 Me. 328.]

by the complainant on the bill indorsed by them both, with interest from October, 1762. Payment was refused, and the suit was instituted in 1768. The defendant pleaded the statute, and, in his answer, stated that he did not recollect, or admit, having indorsed the bill; that he had no notice of its protest, or of its payment, until 1766; and that he knew not whether the complainant had, or had not, expended the trust estate, or whether he had paid any part of the bill. It appeared, however, from the report of the commissioners to whom the accounts were referred, that the bill of exchange was taken up by the complainant, and his own bond executed for the payment thereof in November, 1765. It was adjudged that the statute could "not be considered as commencing to run till the trust *was closed*, which was in 1765; and, in 1768, the suit was instituted."

### 9. *Promises of Indemnity.*

128. An indemnity is what is given to a person to prevent his suffering damage. In general, the statute begins to run in the case of a promise of indemnity, from the time when the promisee actually pays the money or damages, and not from the time when he is liable to pay it.<sup>1</sup> Thus it was held, in *Collinge v. Haywood*,<sup>2</sup> that a right to sue upon a contract of indemnity against the costs of an action is first vested when the party to whom the indemnity is given pays the bill of costs, and not when it is delivered to him; and the statute, therefore, does not begin to run until after such payment. Lord Denman observed, the plaintiff was not damnified until he was called on to pay the attorney's bill, and, until he was damnified, he had no right of action against which the statute of limitations could run.<sup>3</sup> Where the board of managers of a turnpike company authorized two of their number (the plaintiffs) to borrow twelve thousand dollars of a bank, for the use of the company, pledging the stock for its repayment, and the

<sup>1</sup> *Colvin v. Buckle*, 8 Mees. & Welsb. (Ex.) 680.

<sup>2</sup> *Collinge v. Haywood*, 1 P. & Dav. 502, overruling *Bullock v. Lloyd*, 2 Carr. & Payne, 119. See also *Reynolds v. Doyle*, 1 M. & Grang. 753; *Platt v. Smith*, 14 Johns. (N. Y.) 368. [*Illies v. Fitzgerald*, 11 Texas, 417; *Carter v. Adamson*, 21 Ark. 287.]

<sup>3</sup> Per Curiam also, in *Rodman v. Hedden*, 10 Wend. (N. Y.) 500. See also *Powell v. Smith*, 8 Johns. (N. Y.) 249, and authorities there referred to. And see 8 East, 169; 1 T. R. 599.

defendant and several other members of the board entered into a written agreement to guarantee each one-twelfth part of that sum to the borrowers, if the stock should not be sufficient, and the money was borrowed accordingly, and applied to the use of the company, who set apart one thousand dollars to meet discounts, and the plaintiffs, after that sum was exhausted, continued to renew the note from time to time, paying the discounts and curtailments required by the bank, out of their own funds, until the whole was ultimately paid off,—it was held that the contract was an entire one; the defendant's liability continued as long as the loan continued; the plaintiff's cause of action accrued when the whole of the money was paid, and that consequently, if a suit were brought within six years from that time, the statute was not a bar.<sup>1</sup>

129. But where there is a promise to indemnify and *save harmless*, and the promisee is sued and charged in execution, the promise of indemnification is broken, and an action may be maintained without the debt having been paid by the promisee; but he will recover, not the amount of the debt in such case, but only a compensation for the injury which he shows himself to have sustained.<sup>2</sup> On a bond conditioned that the obligor should pay to the obligee all costs and damages that might be awarded against the obligee in consequence of the delivery of a negro to the obligor, it was held that the action accrued when a judgment was rendered against the obligee for the slave, by the party claiming him, though the judgment was not satisfied; because, by the judgment, the

<sup>1</sup> *Jones v. Trimble*, 8 Rawle (Penn.), 275. And see *Douglas v. Reynolds*, 7 Peters (U. S.), 113. [Sundry persons subscribed for shares in a meeting-house, which was to be erected by a committee of their own number, at an expense not exceeding five thousand dollars, and the shares in which were to be one hundred. The subscribers were not to be called upon for any money until the house should be completed. In the subscription paper the subscribers agree, in proportion to the number of shares subscribed for by each, to indemnify and save harmless the committee, for money borrowed for building the house. The committee erected and finished the house at an expense exceeding five thousand dollars, and borrowed money for the purpose in 1829, and gave their note for it, paid it in 1839, and commenced an action against one of the subscribers on his agreement to indemnify in 1841. It was held, that this action was not barred, as the statute did not begin to run against the committee until they paid the note. *Hall v. Thayer*, 12 Met. (Mass.) 130. When a town furnishes supplies to a pauper, the statute begins to run in favor of the town legally liable from the time of the notice, and not from the time of furnishing the supplies. *Cutter v. Maker*, 41 Me. 594.]

<sup>2</sup> *Murrell v. Johnson*, 1 Hen. & Munf. (Va.) 450.



body, goods, and lands of the obligee became liable to execution ; and he could not, by reason of the judgment, make a clear title to his lands.

130. That the origin of a guarantor's liability to be sued is to be determined by, and is dependent upon, the particular stipulation he has made, is shown in the following case : In 1816, G. shipped goods on board a vessel chartered by him for Calcutta, and B. & Co. made advances to enable him to do so, under an arrangement that the goods should be transmitted to the agents, at Calcutta, of B. & Co., who were to dispose of the outward cargo there, and send the proceeds in goods or bills to B. & Co., in London, who were to reimburse themselves their charges, and hold the balance at the disposal of G. In November, 1817, G. being in difficulties, and indebted to the defendants in £850, the defendants and G. applied to B. & Co. to pay off this debt by a further advance to G. on his consignment, and the defendants gave B. & Co. the following guaranty : " Messrs. B. & C. : You having expressed some doubts of the propriety of paying G.'s draft on you for £850, in our favor, we hereby engage, if you will pay us the same, that we will reimburse you the amount on demand, with interest, *in the event of your finding it necessary to call upon us to do so*, either from the state of G.'s pending account with you, or from any other circumstances." B. & Co. thereupon accepted, and paid a bill for £850, drawn by G. on them, in favor of the defendants. The vessel returned to England with a cargo, in April, 1818, when C., the owner (G. having become bankrupt), gave notice to the East India Company (in whose docks she lay) not to deliver any part of the cargo without his authority ; they thereupon sold the cargo, and paid the owner's demand for freight, and in consequence of conflicting claims from G.'s assignees, and from B. & Co., filed an interpleader, and paid the balance into court. Proceedings at law and equity were continued between all the above parties, under legal advice, up to the year 1837, when the result was, that B. & Co. were obliged to pay C.'s costs. In 1838, B. & Co. demanded of the defendants the £850, due by the guaranty, with interest, and their share of the expenses in the law proceedings, and, on their refusal to pay, brought an action against them on the guaranty : *Held*, first, that the statute of limitations began to run against the plaintiffs, not from the termination of the legal proceedings, in 1837, but from the return and sale of the cargo, in

1818, when all the facts were ascertained upon which the defendants' legal liability depended, and, therefore, that it was a bar to the action; secondly, that the defendants could not be made liable, under the guaranty, for the expenses incurred by the plaintiffs in the law proceedings.<sup>1</sup>

10. *Money paid by a Surety on account of the Principal.*

131. An action by a person who has incurred the obligation of a *surety*, against the principal debtor for his default, is not barred by the time which has elapsed since the principal debtor became liable, but from the time only when the surety has paid the creditor.<sup>2</sup> Thus, it has been held, that where an infant gave his promissory note (in the purchase of *necessaries*), signed by himself and a surety, the latter, if he pay the note, is entitled to recover of the infant the amount so paid; and the surety's right of action commences on payment of the note.<sup>3</sup> In an action commenced in 1825, to which the statute was pleaded, it appeared that, in 1813, the defendant as principal, and K. & W. as sureties, made and delivered a promissory note, payable in sixty days. In 1816, K., one of the sureties, paid the amount of the note, without suit, and

<sup>1</sup> Colvin and Others v. Buckle and Others, 8 Mees. & W. (Ex.) 680. [The statute does not begin to run on a guaranty of the debt of another, in consideration of forbearance to sue, until the promisee has forborne for a reasonable time, as no cause of action until then accrues. Thomas v. Croft, 1 Rich. (S. C.) 113. Where there is a continuing guaranty, the statute begins to run from the time of a default. Bank of S. C. v. Knott, 40 Rich. Law (S. S.), 543. An executor sold a slave, the property of the testator, and bought it himself. Afterwards the sale was set aside and the executor decreed to be liable for the price of the slave. In an action against the surety of the executor, it was held that the statute began to run from the time of the decree. Franklin v. De Priest, 13 Gratt. (Va.) 257; Johnson v. Gilfillan, 8 Minn. 395.]

<sup>2</sup> See Hale v. Andrews, 6 Cowen (N. Y.), 225. [Scott v. Nichols, 27 Miss. (6 Cush.) 94; McLean v. Ruysdale, 31 Ib. 701; Barnsback v. Reiner, 8 Minn. 59; Walker v. Lathrop, 6 Clarke (Iowa), 516; Burton v. Rutherford, 49 Mo. 255; Bennett v. Cook, 45 N. Y. 268; Thayer v. Daniels, 110 Mass. 345; Reed v. Flippen, 47 Ga. 273.] It was held in Massachusetts, that the right of action of a co-surety on a guardian's bond, against heirs having assets, is not limited to one year, where the suit is brought within one year of the time; the co-surety was obliged to pay. Wood v. Leland, 1 Met. (Mass.) 387. See also Peters v. Barnhill, 1 Hill (S. C.), 234.

<sup>3</sup> Conn v. Colburn, 7 N. H. 368. [And if the surety pay the note before it becomes due, his right of action against the principal does not accrue till the note becomes payable. Tillotson v. Rose, 11 Met. (Mass.) 299. But if, in an action against the infant and his surety, the former pleads infancy and has judgment, but judgment is given against the principal, and he pays the debt, he pays it not as surety, but as sole debtor. Short v. Bryant, 10 B. Mon. (Ky.) 10.]



without consulting the defendant. W., in 1820, voluntarily paid K. one half the sum the latter had paid in discharge of the note. This payment was made without the knowledge of the defendant, who contended, that, ten years having elapsed since he had known or heard any thing of the transaction, he might rely upon the statute. The court said: "In this case, when K., in 1816, paid the debt, he at once became entitled to an action against W. to compel him to contribute, and might have maintained an action for that purpose at any time within six years after the payment. But it was not necessary that W., or his executor, should be compelled by suit to pay, in order to render the defendant liable to them." Therefore, the court held that when W. (or the plaintiff as his executor) paid to K. one half of the sum which the latter paid, the right of action accrued; and consequently there was no pretence that it was barred by the statute.<sup>1</sup> Though a judgment be

<sup>1</sup> *Odin v. Greenleaf*, 8 N. H. 270. [So where an agent makes a sale of goods for his principal and the goods turn out to be worthless, whereby the agent is subjected to loss, the statute begins to run against the agent's claim upon the principal for indemnity from the time he is damnified or subjected to the loss. *Legare v. Frazer*, 3 Strobb. (S. C.) 377. In Pennsylvania, it is provided by statute, that when an indorser is compelled to pay a note to a bank of which the maker is a stockholder, he may, upon giving notice that he claims the stock and dividends of the maker, in an action for money had and received, recover of the bank the dividends so retained. Under these provisions it is held, that the note is the meritorious cause of action, and the statute begins to run when the note becomes payable. *Farmers' Bank v. Gilson* 6 Barr (Penn.), 57. And the fact, that by a contract of partnership, under seal, between the maker and indorser, it is agreed that the note shall be put into the concern as a part of the maker's contributive share, does not exempt it from the operation of the statute, there being no agreement by the maker to defend the indorser against the payment of the note. *Ibid.* And where one who is not a party to a note divides with the maker the consideration received therefor, and promises the maker to pay his half of the amount when the note becomes due, the statute begins to run against a suit on the promise as soon as the note becomes due; and not from the time of payment, if afterwards paid in full by the maker. *Joiner v. Perry*, 1 Strobb. (S. C.) 76. Where one agrees to pay the debt of another, the statute begins to run from the payment, and not from the agreement. *Moore v. Caldwell*, 8 Rich. Eq. (S. C.) 22. A was indebted to B, and C agreed to pay the debt, but afterward refused, and A was compelled to pay it; and it was held, that, as between A and C, the latter was principal and the former surety, and that the statute began to run against A's claim upon C from the time of the payment of the money, and not from the date of the agreement or from the refusal of C. to pay B. *Ponder v. Carter*, 12 Ired. (N. C.) 242. A owed B, and in settlement between A and C, C was allowed a credit for what A owed B. B demanded the money of C, and on refusal brought suit. Held, that the statute began to run from the demand. *Carroway v. Cox*, Busbee, Law (N. C.), 173. So where upon a compromise of a suit between A and B, the latter agreed to pay A's attorney, but neglected to do it, and A was obliged to

recovered against a surety, and he be imprisoned upon a *ca. sa.*, still that is no satisfaction to the creditor for his debt, or discharge of the principal debtor, and therefore does not entitle the surety to call upon the principal for money paid to his use.<sup>1</sup>

132. This rule, of course, applies to various separate payments made by a surety in behalf of his principal, or of his *co-surety*; and being entitled to sue for each payment as he makes it, the statute may have barred the right of recovery upon the prior payments and not upon the later payments.<sup>2</sup> These rules were applied in the following case: Where three parties, A, B, and C, of whom A and B were sureties for C, promised jointly and severally to pay £300, A having paid the whole, namely, £280, part thereof, more than six years before the action, and £30, being the residue of principal and interest, within that time, it was held, in an action by A against B for contribution, that he could only recover the £30, as the statute barred the rest, because the right of action attached as soon as the plaintiff had paid more than his proportion. And it was also held, in an action on the same note against C, the principal, that the statute was a bar to all except £30, as the plaintiff had a right of action against the principal the moment he paid any thing, for so much money paid to his use.<sup>3</sup>

133. A cause of action against the representatives of a co-surety, for contribution, accrues when, and not before, one surety pays the debt of the principal. One of two sureties who has paid the debt of his principal, and files a bill in equity for contribution, against the heirs of his co-surety, and causes them all, who are within the reach of the process, to be summoned, is entitled by the Revised Statutes of Massachusetts<sup>4</sup> to a decree against them severally for such equal sums as amount, in the aggregate, to a moiety of what he has thus paid, though there are other heirs who are not summoned.<sup>5</sup> And so, if one of the heirs thus summoned die pending suit, his administrator is to be summoned in, and the same decree

pay it, it was held, that A's right of action accrued against B when he paid the money, and no notice to B was necessary. *Deaver v. Carter*, 12 Ired. (N. C.) 267. And see also *Douglas v. Elkins*, 8 Foster (N. H.), 26.]

<sup>1</sup> *Rodman v. Hedden*, 10 Wend. (N. Y.) 500 (per Sutherland, J.); *Powell v. Smith*, 8 Johns. (N. Y.) 249.

<sup>2</sup> *Butler v. Wright*, 20 Johns. (N. Y.) 367. See also *Davies v. Humphreys*, 6 Mees. & Welsb. (Ex.) 153; [*Knotts v. Butler*, 10 Rich. Eq. (S. C.) 148.]

<sup>3</sup> *Davies v. Humphreys*, *supra*.

<sup>4</sup> Revised Statutes, c. 70.

<sup>5</sup> *Wood v. Leland*, 1 Met. (Mass.) 387.

will be passed against him that would have been passed against his intestate.<sup>1</sup>

134. If a surety, as, for example, an accomodation indorser, pays a judgment obtained against him, by giving his *promissory note*, which is accepted by the plaintiff in satisfaction of the judgment, and in full of his claim, the cause of action by such surety against the principal to recover as for money paid is perfect; and in such case the statute commences running, though the note remain unpaid. Therefore, under the circumstances of a given case, a plea of *actio non accrevit* will bar a recovery by the surety against the principal, although, counting from the time of the actual payment of the *note* given, the statute would be no bar.<sup>2</sup>

135. Seizure of goods or lands upon execution, or a sale of them by the sheriff, is not *ipso facto* a payment of the judgment upon which the execution issued; nor can it be considered paid until there be an actual payment, or a final appropriation of the money, so as to enable the defendant to resort by action to a co-defendant or a co-surety for contribution; and in such cases the statute then only begins to run.<sup>3</sup>

<sup>1</sup> Ibid. [And if one of two sureties is sued by the payee of a note before the action is barred by the statute, and judgment is rendered after the statute would have been a bar, the surety who pays the judgment has an action over against his co-surety for contribution any time within six years from the time of payment. *Crosby v. Wyatt*, 10 Shep. (Me.) 156. And see also *ante*, § 89. So he may sue the principal, although, by failure to join the principal in the suit against the surety, the principal is discharged. *Reid v. Flippen*, 47 Ga. 278, overruling *Turner v. McCarthy*, 42 Ga. 491. If one of several joint debtors dies, the right to proceed for the recovery of the debt against his representative does not accrue until the survivors become insolvent or irresponsible, and the statute does not begin to run against such action till that time. *Leake v. Lawrence*, 11 Paige (N. Y.), Ch. 80; s. c. in Court of Errors, 2 Denio (N. Y.), 577.]

<sup>2</sup> *Rodman v. Hedden*, 10 Wend. (N. Y.) 498; *Barclay v. Gouch*, 2 Esp. 571. [A guaranty that a note payable at a future day "is due, and that the maker has nothing to file against it," is to be considered as referring to the time when the note arrives at maturity, and from that time the statute of limitations begins to run. *Adams v. Clarke*, 14 Vt. 9. The liability of the drawer or indorser of a bill of exchange accrues when the bill is dishonored by the acceptor. *Hunt v. Taylor*, 108 Mass. 506. But it has been elsewhere held that where a subsequent indorser pays the note, the statute runs in favor of the prior indorser from the time of payment. *Pope v. Bowman*, 27 Miss. (5 Cush.) 194.]

<sup>3</sup> *Lytle v. Mehabby*, 8 Watts (Penn.), 267; *Rodman v. Hedden*, *supra*. [In Massachusetts, where it is provided by statute that an equity of redemption may be sold on execution, and that a bill in equity to redeem the same may be brought within one year after the sale, the time is to be reckoned from the actual sale, and not from the commencement of the levy. *Houghton v. Field*, 2 Cush. (Mass.) 141. The ten-

ant is liable to his landlord for mesne profits when he surrenders possession, and from that time the statute runs. *Doe v. Jones*, 6 B. Mon. (Ky.) 388. Where a mortgage of real property is assigned as collateral security for a debt other than the mortgage debt, and foreclosed by the assignee, by whom the land is afterwards sold, the debt to secure which the assignment is made is not paid by the foreclosure, but only by the actual sale and conversion into money ; and where the debt so secured is that of another person, the right of action of the mortgagee against him, as for money paid to his use, is not barred by the statute until the expiration of six years after such sale and conversion. *Brown v. Tyler*, 8 Gray (Mass.), 135. An action to recover land sold for taxes must be brought within two years from the time when the deed is recorded. *Leffingwell v. Warren*, 2 Black (U. S.) 599. In Iowa the statute begins to run in favor of a tax title when the deed is recorded. *Douglass v. Tullock*, 84 Iowa, 262. When collateral is given for a debt, this will be presumed to be due on demand, if it does not otherwise appear. *Espinoza v. Gregory*, 40 Cal. 58. A statute limiting the time for suing out a mandamus begins to run from the time when the facts creating the duty are complete, and not from the demand and refusal ; otherwise, by delaying demand and refusal, the plaintiff might suspend the operation indefinitely. *Prescott v. Gonser*, 84 Iowa, 175. Where A agrees to pay such a sum as the referee shall allow him on a claim in set-off, the right of action accrues for the amount allowed when judgment is entered on the record, and the fact that judgment was afterwards reversed does not affect the rights of the promisee, as his rights became vested on the entry of judgment. *Chaplin v. Wilkinson*, 62 Barb. (N. Y.) 46. For other cases illustrative of the question as to when the cause of action accrues, see *post*, Ch. XXVII.]

## CHAPTER XIII.

## TORTS QUASI EX CONTRACTU.

136. It has been before shown, that the action of *assumpsit* will, in all cases, lie for damages resulting from torts *quasi ex contractu*, such as malfeasance, misfeasance, and non-feasance.<sup>1</sup> The rule in such cases is, that the cause of action arises immediately on the happening of the default, and is not postponed to the damage thereby occasioned. It is true, that Lord Kenyon said, in an action against an attorney for a defect in the memorial of an annuity, arising from his negligence, by which the plaintiff lost the benefit of his annuity, and the money paid for the same, that the inclination of his opinion was (though he had not made up his mind upon it), that the plea of the statute was insufficient, on the ground that the damage was within six years.<sup>2</sup> But the law has since been well settled in England, agreeably to the rule above stated, and in this country also. Thus, in England, in an action against an attorney for negligence in not investing the plaintiff's money on a good security, the default having happened more than six years before the action was brought, it was held that the remedy was barred, though the discovery of the default was within six years.<sup>3</sup> The same principle was enforced in a case in the Supreme Court of New York. In this case, the defendant had

<sup>1</sup> See *ante*, Ch. IX. § 71.

<sup>2</sup> 4 Esp. 18.

<sup>3</sup> *Brown v. Howard*, 4 Moore, 508; s. c. 2 B. & Bing. 73. Other English cases, *Howell v. Young*, 5 Barn. & Cres. 259; *Battley v. Faulkner*, 8 Barn. & Ad. 288. [*Cook v. Rives*, 18 S. & M. (Miss.) 328. Where a person has been guilty of negligence or a breach of duty, the gist of the action is the negligence or breach of duty, and not the injury consequent thereon. The statute, therefore, begins to run from the negligence or breach, whether the action in point of form be case or *assumpsit*. *Thurston v. Blackinton*, 86 Ind. 501; *Northrop v. Hill*, 61 Barb. (N. Y.) 136; *Argall v. Bryant*, 1 Sandf. (N. Y.) Sup. Ct. 98; *Sinclair v. Bank*, 2 Strobb. (s. c.) 344; *Ellis v. Kelso*, 18 B. Mon. (Ky.) 296; *Lathrop v. Snellbaker*, 6 Ohio (n. s.), 276; *Gustin v. Jefferson*, 15 Iowa (7 With.), 158. The right of a town to recover damages of a railroad, incurred by reason of the negligence of the latter, accrues when the liability of the town is fixed and ascertained. *Veazie v. Penobscot R. R.*, 49 Me. 126. And see *post*, §§ 139, 181, 186, 298, 306, and *ante*, § 117.]

agreed to remove his goods from a warehouse in 1803, but neglected to do so; and in consequence of which, the plaintiff, in 1806, was obliged to pay damages to the person to whom he had sold it. The cause of action, it was determined, accrued when the defendant neglected to remove the goods, in 1803, and not when the plaintiff was obliged to pay damages in 1806.<sup>1</sup>

137. The gist of an action of *assumpsit* for the violation of a special contract is the breach of such contract, and not any resulting or collateral damage occasioned thereby. The statute runs, therefore, from the time when the contract is broken, and not from the period when any damage arising therefrom is sustained by the plaintiff; and, although such damage accrue within six years, the action is defeated by the statute, if the contract was broken beyond that period.<sup>2</sup> Where A, under a contract to deliver *spring* wheat, delivered to B *winter* wheat; and B having again sold the same as spring wheat, had, in consequence, been compelled by action to pay damages to his vendee, and afterwards sued A in *assumpsit*, for his breach of contract, alleging, as a special injury, the damages so recovered, it was held, that, although the special damage occurred within six years, yet, as the breach of the contract had happened, and was known to B more than six years before that period, the statute of limitations was a bar to his action.<sup>3</sup> In this case, Mr. Justice Bailey said, "that this was an action for a breach of contract, and the cause of action arises at the time when the contract is broken. Since that time certain damages have resulted from that breach of contract. The breach of the contract, however, is the gist of the action, and the special damage is stated merely as a measure of the damages resulting from that cause of

<sup>1</sup> *M'Kerras v. Gardner*, 3 Johns. (N. Y.) 137. [A agreed to sell the plaintiff's negro in another State, collect his hire, and on his return pay off a certain judgment. He returned to the State, but did not pay off the judgment, and it was held that the statute began to run against the plaintiff's demand upon him, at the time of his return. *Baines v. William*, 3 Ired. (N. C.) 481. But where a sheriff collected part of an execution, but failed to indorse the amount thereon, and afterwards collected the whole, but, upon the representation of the execution debtor that he had already paid a part, promised, if it were so, to refund the amount previously paid, it was held that the statute of limitations began to run from the time of the promise, and not from the time of receiving the money, or from the time of the failure to pay it over. *Tarkington v. Hassell*, 5 Ired. (N. C.) 359.]

<sup>2</sup> *Howell v. Young*, 4 Barn. & Cres. 259; *Rankin v. Woodworth*, 3 Penn. 48. [Smith v. Fox, 6 Hare, 386; s. c. 12 Jur. 130.]

<sup>3</sup> *Battley v. Faulkner*, 3 Barn. & Ald. 288.

action. One of the objects of the statute was, that actions should be brought to trial at a period of time when the defendant could be prepared, with his witnesses, to meet the charge, which would not be the case if the action might be postponed to an indefinite period." He then put the following case, to show what the consequences might be, if the party was bound only to sue out his writ at the time when the measure of damages was ascertained, and not when the contract was broken: "Suppose the present plaintiff had sold the wheat to S, and he had sold it again to A, and A to B, and B to C; then suppose C to wait for five years, and then to bring an action against B and recover; and that at the end of five years more B should bring an action against A, and that A, at the end of another five years, brought an action against S, and that S took five years more before he brought his action against the present plaintiff. Then each party having acquired a new five years after the original transaction, brings an action against the present defendant." It was by putting an extreme case, he said, that the propriety of a rule was often tried.<sup>1</sup>

<sup>1</sup> [The doctrine as stated in the text has been recently applied in what the court thought a case of extreme hardship upon the plaintiff. The facts were, that the defendant had contracted to sell the plaintiff a quantity of salt, but the salt having been destroyed, upon the plaintiff's demand for delivery the defendant purposely prolonged negotiations till the statutory limitation for bringing the action had expired, and then refused, whereupon the plaintiff brought suit. It was held, that the action was barred, and that it should have been brought within six years from the demand, as the non-delivery at that time was a breach of the contract. *East India Co. v. Paul*, 1 Eng. L. & Eq. 44. Lord Campbell, who delivered the opinion of the court, held the following language: "It would have been very satisfactory to us if, consistently with the rules of law, we could have found evidence to show that any cause of action stated in the declaration arose to the plaintiff within six years before the commencement of his suit. There seems no doubt that the defendants have broken their contract with him, and that if he had commenced his action against them in February, 1832, instead of agreeing to the inquiry, which was conducted so tediously, he would have been entitled to damages equivalent to the salt which remained undelivered. But this inquiry, through the fault of the company's servants, was not terminated till the 16th May, 1838. Almost as soon as the final refusal of the company to return any part of the purchase-money was communicated to the plaintiff, he commenced the present action. It will, therefore, be an extreme hardship on him, if, by reason of this delay, which they occasioned, they may successfully defend themselves by pleading the statute of limitations. But it is the duty of all courts of justice to take care, for the general good of the community, that hard cases do not make bad law. Upon the special counts of the declaration, the cause of action disclosed is the refusal to deliver the residue of the salt purchased and paid for. When did this accrue? From that point of time the statute of limitations began to run, and when it once began to run nothing could stop it, so that, in six years thereafter,



138. Where a note was indorsed by the holders to a bank for collection, whose notary negligently omitted to charge a prior indorser, by giving notice of non-payment, and the bank was sued by their indorsers for neglect, and compelled to pay damages,—it was held, in an action of assumpsit against the notary, that the cause of action arose immediately on the omission. The bank, therefore, not having sued till more than six years after, were barred by the statute. And this, though the former suit and recovery thereon against, and payment of damages by, the bank to the holders, were all within six years of the suit against the notary.<sup>1</sup>

139. A promissory note was, by the plaintiff, placed in the hands of an attorney for collection, and the circumstances of his management were, that he instituted an action of assumpsit thereon against the drawer on the 7th of May, 1820, but neglected to do so against the indorser. The drawer proved insolvent. On the 8th of February, 1821, the attorney sued the indorser, but committed a fatal mistake by a misnomer of the plaintiff; upon which after passing through the successive courts of the State, the judgment of nonsuit was finally rendered against the plaintiff. Before that time, the action against the indorser was barred by the statute of North Carolina (the time being three years), on the 9th November, 1822. The suit was instituted on the 27th January, 1825. The questions in the case were, whether the statute commenced running when the error was committed in the commencement of the action against the indorser; or whether it commenced from the time that the damage was developed and became definite. It was held, that the statute began to run from the time of committing the error by the misnomer in the action against the indorser.<sup>2</sup> The same was held in an action against an attorney for negligence in Alabama.<sup>3</sup>

the right of suit was barred. The rule is firmly established, that in assumpsit the breach of contract is the cause of action, and that the statute runs from the time of the breach, even where there is fraud on the part of the defendant. That is laid down in *Battley v. Faulkner*, 8 B. & Ald. 288; *Short v. Macarthy*, Ib. 626; and *Brown v. Howard*, 2 Br. & B. 78. When the plaintiff tried to obtain the 10,000 maunds of salt, and he was told by the agents of the company that there was no salt in the golahs to deliver to him, the contract was undoubtedly broken, and the cause of action had accrued.”]

<sup>1</sup> *Bank of Utica v. Childs*, 6 Cowen (N. Y.), 238. And see also *Niagara Bank v. Plumb*, 9 Wend. (N. Y.) 287. [*The Governor v. Gordon*, 15 Ala. 72.]

<sup>2</sup> *Wilcox v. Executors of Plummer*, 4 Peters (U. S.), 172.

<sup>3</sup> *Murdis v. Shackelford*, 4 Ala. 495. [But see *ante*, § 186, note.]



140. In an action on a bond given for the liberty of the jail yard, in which there was proof of *two breaches* at different periods, it was held, that a special act of limitations by which such actions are limited to one year commenced running at the time of the first breach; the amount recoverable therefor being the same as for *both* breaches.<sup>1</sup>

141. If an action be commenced immediately when a person becomes chargeable with negligence or unskilfulness, perhaps no more than nominal damages may be proved, and no more recovered; but, on the other hand, it is perfectly clear that the proof of actual damage may extend to facts that occur and grow out of the injury, even up to the day of the verdict. If so, it is clear that the damage is not the cause of the action.<sup>2</sup>

142. There may be sometimes a difference of opinion as to the precise time at which the default should be fixed. Where a captain of a ship insured carried her barratrously out of the course of her voyage, and procured her to be condemned in a Vice-Admiralty Court, sold her, and delivered her up to the purchaser, and the loss was laid in the declaration to have been by the barratry of the master, it was held, on the plea of the statute, that it was only from the last event that the statute began to run, as between the assured and the underwriter.<sup>3</sup> In an action against persons who had been directors of a bank in Massachusetts, founded on the equity of the statute incorporating the bank, for mismanagement of the affairs thereof, it was held, that the action was barred when six years had elapsed from the time the bank became publicly insolvent. It was also held, that although the act of limitations is not applicable to bank-notes, where an action is brought thereon against the corporation, as the notes are never paid unless given up by the holder at the time of the payment, yet where the action is brought against the directors, and is founded on their im-

<sup>1</sup> *Brown v. Houdlette*, 1 Fairf. (Me.) 399. [But where more than twenty years after the making of the bond a sheriff brought an action against his deputy on his bond, among other things, to account once in six months, and alleged that the deputy had rendered no account since his appointment, it was held, that, although there was a breach of the condition of the bond more than twenty years before action brought, yet the sheriff was entitled to recover for all breaches within twenty years. *Austin v. Moore*, 7 Met. (Mass.) 116; *Arnott v. Holden*, 16 Eng. L. & Eq. 142. And see *ante*, §§ 110, 111.]

<sup>2</sup> *Wilcox v. Executors*, *supra*. And see *Sheriff of Norwich v. Bradshaw*, 1 Cro. Eliz. 53.

<sup>3</sup> *Hibbert v. Martin*, 1 Camp. 589.

puted malfeasance or non-feasance, there was no distinction in the application of the act of limitations between such a case and any other special action on the case.<sup>1</sup> Where a sheriff was sued for an insufficient return upon an original writ, by reason of which the judgment rendered in that suit was reversed, it was held, that the statute began to run from the time of the return, and not from the reversal of the judgment. The court considered that the plaintiff should be presumed to have seen the defect in the return when it was made in the clerk's office, and that he should have procured its amendment.<sup>2</sup> So in an action against an officer for taking insufficient bail, in which the plaintiff's counsel contended that the right of action against the officer did not commence until the insufficiency was ascertained by the execution issued on the *scire facias* being returned unsatisfied. But the opinion of the court was, that the plaintiff might have commenced his action against the defendant immediately after the return of *non est inventus* upon his execution against the principal debtor; and, as more than six years had elapsed from that time before action brought, the action was barred.<sup>3</sup>

<sup>1</sup> *Hinsdale v. Larned*, 16 Mass. 68. [And see *Baker v. Atlas Bank*, 9 Met. (Mass.) 182. And see *ante*, § 95, note.]

<sup>2</sup> *Miller v. Adams*, 16 Mass. 456. See *Fisher v. Pond*, 1 Hill (N. Y.), 672.

<sup>3</sup> *Mather v. Green*, 17 Mass. 60. If the action against a sheriff is for an escape, it must be brought within six years from the time of the escape. *Cockran v. Welby*, 2 Mod. 222. And see *French v. O'Neil*, 2 Har. & M'Hen. (Md.) 401. [*West v. Rice*, 9 Met. (Mass.) 564. Where a sheriff collects money on an execution and returns it satisfied, but does not pay it over, the responsibility of his surety is fixed by the return, and the statute begins to run in his favor from that time. *Governor v. Stonum*, 11 Ala. 679. And where a sheriff has received money on a *scire facias*, the statute runs in his favor from the time when it was received. *Thompson v. Central Bank*, 9 Ga. 418. And see *Edwards v. Ingraham*, 81 Miss. (2 George) 272. But in Massachusetts it was held, in an action against the sheriff for money by him collected on an execution which was returned satisfied, that the statute did not begin to run against the execution creditor until a demand was made, as he had till then no cause of action. *Weston v. Ames*, 10 Met. (Mass.) 244. So in Louisiana, *Pitkin v. Rousseau*, 14 La. Ann. 511. And where a sheriff has taken insufficient sureties in replevin, the statute begins to run from the time when the plaintiff fails to return the property replevied on demand after judgment therefor. *Harriman v. Wilkins*, 2 App. (Me.) 98. And the right of action of an attorney against a sheriff for taking insufficient bail accrues when the attorney's lien for his costs is perfected by the rendition of judgment. *Newbert v. Cunningham*, 50 Me. 281. So where the sheriff wrongfully releases attached property. *Lesem v. Neal*, 53 Mo. 412. It has been held that where a sheriff, contrary to his instructions, neglects to attach sufficient property, as he might have done, a cause of action arises against him on the return of the writ, and the statute then begins to run, and not from the time when, by a levy of the execu-

tion, the insufficiency of the property is ascertained. *Betts v. Norris*, 8 Shep. (Me.) 814; *Garlin v. Strickland*, 27 Me. (14 Shep.) 448. But the doctrine of *Betts v. Norris* has been denied in Connecticut, in *Bank of Hartford Co. v. Waterman*, 26 Conn. 824, upon grounds and distinctions which certainly are obvious, and of so much importance that we feel warranted in giving the opinion of the majority of the court in full; Ellsworth, J., *dissentiente*. The sheriff made return on the writ that he had attached a certain piece of land belonging to the defendant, and had left with the town clerk a true and attested copy of the writ and of his indorsement thereon. He had in fact left with the town clerk a copy of the writ with an indorsement thereon, that he had attached a different piece of land from the one described in his return. The error was not discovered until the debtor had failed, and had no property upon which to levy execution. The opinion by Storrs, C. J., was as follows: —

“ This action is founded on the neglect of an officer to make a valid attachment of real estate, and a false return that he had made such attachment, whereby the plaintiffs, when they undertook to enforce their supposed lien by the levy of an execution, to their surprise failed to obtain satisfaction, and lost their debt. The defendant meets these averments with a plea of the statute of limitations, which restricts the right of suit for such injuries to a period of two years next after it shall accrue. Ignorance of his rights, on the part of the person against whom the statute has begun to run, will not suspend its operation. He may discover his injury too late to take advantage of the appropriate remedy. Such is one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time. *Brown v. Howard*, 2 Brod. & B. 73; *Sims v. Brutton*, 1 Eng. L. & Eq. 446; *Short v. McCarthy*, 3 B. & Ald. 626; *Blair v. Bromley*, 5 Hare, 542; *Batley v. Faulkner*, 3 B. & Ald. 288. Strong equitable considerations in favor of the present plaintiffs seem, however, to grow out of the fact that they were actually *betrayed* into ignorance of their rights by the wrongful acts of the defendant himself; that they were misled by the very record to which they might and should rightfully refer for knowledge of their rights, and of which the defendant was himself the author, having verified it under his official oath. It is palpably unjust for the defendant to set up the statute as a defence under such circumstances; to do so is in one sense taking advantage of his own wrong. Yet it is difficult to see that he is not, by the clear provisions of the statute itself, protected in so doing; nor are we aware of any well-established doctrine by which a party in a court of law can be prohibited, on the score of equitable estoppel, from defending himself under a public statute, designed to be of universal operation in the matter of legal remedies. Lord Campbell properly suggested, relative to a controversy not unlike the present, that ‘hard cases must not make bad law.’ *East India Co. v. Paul*, 1 Eng. L. & Eq. 44, 48. At the same time, if the *dictum* of Lord Mansfield (*Bree v. Holbeck*, Doug. 655), that ‘there may be cases which fraud will take out of the statute of limitations,’ were confirmed by direct adjudication, we should be reluctant to withhold the application of the doctrine in the present instance. See *Blair v. Bromley*, *supra*. These views are, however, immaterial to either party; as the cause of action, in our judgment, accrued — that is to say, became complete and perfect — within two years next previous to the commencement of the present suit. Whether the true basis of the injury eventually suffered by the plaintiffs was the neglect to serve the process or the false return, it cannot be useful to determine, as neither of these facts singly or both together, in our opinion, would be enough to constitute a cause of action. No right to sue became lodged in the plaintiffs until a certain *consequence* resulted from one or both of these breaches of duty by the officer. If this be so, that the damnifying consequences of the defendant’s violation of duty are an essential ingredient in the plaintiffs’ cause of action, the statute of limitations cannot begin to run until this cause of action

becomes complete. The consequences are not, in such a case, mere aggravating circumstances, *enhancing* a legal injury already suffered or inflicted; nor are they the mere *development* of such a previous injury, through which development the party is enabled for the first time to ascertain or appreciate the fact of the injury; but, inasmuch as *no legal wrong* existed before, they are an indispensable element of the injury itself, and must therefore themselves fix, or may fix, the period when the statute of limitations shall begin to run. Authorities can hardly strengthen a proposition so manifestly just. If we are wrong, some strictly legal injuries might never for a moment be capable of redress. For instance, so much time might accrue between the injurious act of bringing a vexatious suit and its final termination in favor of the defendant therein that, if the original act were the entire *gravamen* of the latter's suit against the wrong-doer, he might be barred of his remedy before his right to redress ever vested in him for a single hour. But authorities are not wanting on this point. When the injury, however slight, is complete at the time of the act, the statute period commences. *Woodsworth v. Harley*, 1 B. & Ad. 391. But when the act is not legally injurious until certain consequences occur, the statute begins to run from the consequential injury. *Roberts v. Read*, 16 East, 215. In *Gillon v. Bodington* (1 Car. & P. 541), it is agreed that the language of the English statute was even somewhat strained to make its construction comport with this very just principle, — the limitation by that enactment taking date from the 'fact committed,' and the court extending the meaning of this term so as to make consequential damage one essential part of the *fact* referred to. It only remains therefore, to determine whether a neglect to serve mesne process, or a false return of such process, is actionable in itself, or whether it becomes so only when a real injury follows from it. No distinction can be drawn between a neglect to serve and a false return in deciding the point presented. Lord Denman, in *Wylie v. Birch*, 4 A. & E. 566. The case of *Planck v. Anderson*, 5 T. R. 87, early settled the doctrine that, when an escape or mesne process took place, the only remedy for the plaintiff was an action on the case for the consequential injury, and that, 'if no damage be sustained, the creditor has no cause of action.' Buller, J. Of the contrary decision of *Barker v. Green* (2 Bing. 317), we shall take occasion to speak hereafter. After the latter decision, in 1836, Lord Abinger, at the Exchequer Chamber, in a colloquy with counsel, took strong ground against the idea that an officer was at all events liable in nominal damages for neglect to serve mesne process. *Brown v. Jarvis*, 1 Mees. & Welsb. 708. Two years after, the same court unequivocally denied the right of a plaintiff to subject an officer for an escape on mesne process, unless he had sustained actual damage or delay of his suit thereby. *Williams v. Mostyne*, 4 Mees. & Welsb. 145. They expressly disapprove *Barker v. Green*, suggesting, perhaps incorrectly, that it is loosely reported. Lord Denman, while delivering the judgment of the Court of Queen's Bench in 1839, used this language: 'No damage is stated, unless some *legal damage* necessarily results from the neglect of the sheriff [to arrest on mesne process]. We do not think that any such damage does necessarily result.' That is to say, the act is not in itself legally injurious.

"The Supreme Court of New Hampshire early decided that a sheriff is not liable to an action for an escape on mesne process, if he have the body at the return of the writ. *Cady v. Huntington*, 1 N. H. 188. In *Clark v. Smith*, which was twice before the Supreme Court of this State (9 Conn. 379, 10 Ib. 1), and in which the court decided that a creditor's recovery against a sheriff for an escape on mesne process must be restricted to his actual damage, the doctrine of Justice Buller, enunciated in *Planck v. Anderson*, and quoted above, was cited by the court in full without dissent. 9 Ib. 386. Upon the second trial of the cause, the jury found for the defendant, the court below having instructed them that the defendant was liable only for damages

which the plaintiff had sustained by reason of the officer's neglect. This might have been construed to award no damages whatsoever, unless some actual injury was shown. The jury, at all events, felt themselves at liberty to act under such a rule ; and, although the case was not brought before the Supreme Court on account of a verdict against evidence, yet that tribunal seem freely to have assumed that the judge's charge to the jury was susceptible of the construction just suggested, and thereupon indorse the verdict. Judge Bissel says : 'The jury were directed to give damages commensurate with the loss sustained by the officer's neglect. For aught that appears, they have done so ; and neither the principles of justice nor any rule of law demands of us that we should interfere with their verdict.' We must believe that the law is settled, that actual damage is an essential element in a cause of action relating to a negligent service or false return of mesne process. Roscoe's *Nisi Prius*, 609 ; 2 Saund. Pl. and Ev. 878. Something may properly be said of decisions which our examination of this case has brought to light, and which have an aspect adverse to the views adopted by us. Before discussing them, it is well to remark, that a distinction is often drawn in the books between a cause of action growing out of a non-feasance or misfeasance relating to mesne process, and the same when they concern writs of execution. We believe the difference between the two cases to be practical rather than theoretical. We have no doubt that actual damage must be the basis of recovery in both (*Wylie v. Birch, supra*) ; but that it is presumed to be incident to the one, and not to the other. The burden of proof lies on the plaintiff in the latter instance to show some actual damage ; in the former, on the defendant to show that there has been none. It has been held, that if an officer charged with a false return on final process can prove that *after* the return the debtor became a legal bankrupt, so that the holding of the body could have been of no avail to the creditor, a complete defence is established ; and that a plea in bar, setting up the bankruptcy only, is a complete answer to the action. *Wylie v. Birch, supra*. Now it is idle to say that proof of actual damage is not necessary in the case of an omission to execute final process, when disproof of such damage is a perfect defence. If a trespass is made upon land, the act is legally injurious ; nominal damages at least must be awarded. The trespasser cannot establish a complete defence by proving there was no real loss to the plaintiff. Still courts have sometimes ruled that they will presume some actual damage to be necessarily incident to a breach of duty in reference to final process. The body being held by an execution for the payment of the debt, not for its security merely, they have regarded an escape, even for a short time, as suspending the debtor's inducement to perform his duty of *immediately* paying his obligation, as taking away from the creditor, for the time being, that which the law gives him as his *satisfaction*, and as invading his right to the constant, uninterrupted detention of the debtor's body. But no such inference, however regarded, arises in the case of a neglect to retain the custody of a debtor on mesne process. The debt may notwithstanding be perfectly secure, and enforced as promptly as if the security was constantly under the control of the officer.

"To return : *Barker v. Green* was an action for a failure to arrest on mesne process. The jury, finding no actual damage, rendered a verdict of one farthing. An attempt, with a view to costs only, was made to set aside the verdict. The court refused the motion, holding that, 'if there was a breach of duty, the law must presume some damage.' In *Betts v. Norris*, a decision of the Supreme Court of Maine, much noticed at the bar, the opinion of the majority of the bench seems to rest on the same idea, that a breach of official duty is necessarily a violation of the individual legal rights of the person in whose favor the duty is to be performed. 21 Me. 814. We cannot assent to the sweeping doctrine of these cases. It would invite interminable and preposterous litigation. We apprehend, as has been suggested by the counsel



for the plaintiffs, that a distinction is to be observed between breaches of public duty and breaches of duty to individuals; such, for instance, as those created by contract, whereby each party enters into and defines for himself an immediate obligation to the other. In the latter case, the breach of such an obligation is a direct and immediate wrong to the other, so that, whether any evil consequences follow, or whatever consequences follow, the cause of action dates from the wrong, which will be treated as the cause of action, whether the plaintiff sues in tort or in contract. For instance, if an attorney neglect his client's business in such a manner as to break the implied contract between them, although a loss may not occur for years, a complete right of action accrued when the duty was violated; and the subsequent loss merely aggravates the injury. And, whether he be sued in assumpsit or in case, the breach of duty will always be the injury for which he must respond. *Howell v. Young*, 5 B. & C. 259; *Short v. McCarthy*, *supra*; *Brown v. Howard*, 2 Brod. & B. 78; *Wilcox v. Plummer*, 4 Pet. 172. But where the duty is of a public nature, there is no direct relation between the public officer and the party in whose behalf the duty is to be performed. If it were so, then there should be the implication of a contract between them, and non-performance be actionable in assumpsit. Yet it is clearly settled that the latter form of action cannot be sustained in such a case. *Lowell v. Bellows*, 7 N. H. 875, 388. The duty violated is primarily a duty to the public; the violation is therefore unlawful, and when its consequences are the invasion of an individual right (and then only) it becomes a proper subject of redress by him. The duties imposed upon public officers are analogous to those of moral obligation. Their violation is not necessarily a legal injury to those in whose favor they exist. They must affect some right such as the law is wont to redress, before they can be made the subject of a suit. It is the duty of a municipal corporation to keep highways free from obstruction. The duty is to the public for the benefit of every individual in the community. If an obstruction is negligently permitted to exist, it may be said that, in a sense, a duty to each individual is violated. But it is not competent for every inhabitant of the vicinage thereupon to bring his action for the breach of duty to himself; not even if he is put to some trivial inconvenience by the obstruction. If he voluntarily or negligently throws himself in the way of being injured by it, he cannot recover. *Butterfield v. Forrester*, 11 East, 60. The mere violation of the public duty, although the duty is to him indirectly, involves no correlative legal right on his part to sue for such violation. It is said familiarly that rights and duties are reciprocal. This is, in a moral sense, and in a properly understood legal sense, true. But it is evident, from the illustration just employed, that there is no such legal reciprocity between the general duties of public officers and the rights of parties in whose behalf the duties are to be performed, that the right is always actionable when the duty is violated. In the case of the highway, a person must be injured in reference to some other right than that which is correlative to the mere duty of keeping the highway clear for his benefit,—in his right to his health or limbs or property,—before he can seek legal redress. Then he will have suffered a consequential not an immediate injury, and can resort to his action on the case.

“An officer neglects to serve a subpoena. It would be said to be his duty to serve all subpoenas. A plaintiff who gave it to him goes to trial; the witness voluntarily appears, and a full recovery is obtained. Could a suit be sustained by the plaintiff for the non-feasance of the officer? Is the plaintiff's legal right coextensive with the officer's duty? or must some other right of the plaintiff be affected by the neglect, to enable him to sustain an action? A writ of attachment is served, without the plaintiff's consent, as a summons. The defendant is perfectly responsible, and the plaintiff, without delay or embarrassment, obtains complete pecuniary satisfaction. Can he resort to the officer for the breach of his duty in not complying with the man-

date of the writ? An assessor's duty is to make a correct assessment in the case of every tax-payer. This is the obligation he owes to the public. His conduct is unlawful if he neglects it. If a tax-payer is assessed too little, the public duty is violated. Can the tax-payer sustain a suit therefor? or, even if his property is assessed too much, must he not wait till some other right than that which corresponds to the official duty (such as his right to his property, which may not be taken for an illegal tax) is violated, before he can sue? To hold that every non-feasance and misfeasance of an officer is actionable *per se* in favor of the party who is the special subject of the duty neglected or violated, would be a source of infinite confusion. We concur in the proposition of Mr. Justice Shepley, whose dissenting opinion in *Betts v. Norris* seems to us to contain reasonings more cogent and conclusions more just than those of the majority of the court, that 'a mere violation or neglect of duty enjoined by law, or otherwise imposed without contract, unless accompanied or followed by an injury to some person, cannot be the foundation of an action at common law.'

"Again, it would seem that, for the justification of our general position in the present case, a strict reciprocity between public duties and individual rights might be safely conceded. The term 'duty' may be used in a sense too strict to stand the test of legal criticism. We say familiarly that it is an officer's duty to serve process, — to obey the mandate of a writ. Now it is his *function* to do so; but is it necessarily his duty, in an absolute sense? If not, then there is no absolute right on the part of a suitor to the performance of the function. If the right and duty were absolute, that a writ must be served, — served according to its literal mandate, and indorsed with a true return, — then an officer could not defeat an action for an escape on mesne process, by showing that the plaintiff had no lawful claim against the debtor. Yet that he can, is an elementary principle. *Alexander v. Macauley*, 4 T. R. 611. Now the real right which the law confers upon a suitor, and the real duty it imposes on an officer, is that the claim shall be enforced, the debt collected, through the law's process. The creditor has no absolute right to require that the exact amount of property set forth in his writ shall be attached. If the officer attaches but a tenth of that sum, and this is sufficient to cover the plaintiff's debt, he has performed his duty, and infringed upon none of the suitor's rights. The same course of reasoning would show that the plaintiff has no absolute right to a correct return. For instance, if its falsity should never become known to the adverse party, and an execution should be levied upon the property originally taken, and should legally condemn it for the plaintiff's benefit, no action would lie. It is but another step in a perfectly natural chain of reasoning to say that the suitor has no absolute right to require that any of the defendant's property shall be attached; although it is the officer's legitimate function to obey the writ. His right is that the property of the defendant, or a certain portion of it, which was in reach at the time the attachment should have been served, or its equivalent, shall be forthcoming at the time of the issue of the execution, in case the execution debt is not paid on the officer's demand. So far as the attachment is concerned, therefore, the creditor is only entitled to require that the officer shall proceed at his peril if he omits to attach. A suitor's right is not, then, a right to literal forms of procedure, but to enforce his judgment and collect his debt by law. Until this right is injured, no right is injured. Until the officer fails to bring the property of the debtor within the power of the law's final process, founded upon a creditor's valid judgment, he has been guilty of no violation of duty in a legal view. So that, if we suppose a direct relation between the plaintiff and the officer, — a legal reciprocity of right and duty between them, — and concede that damages are to be presumed where the former is invaded or the latter violated, it is clear that neither of these incidents occurs until something more than a neglect to attach or an incorrect return is imputed to the officer. The doctrine to which our course of rea-



soning has brought us is not novel as a general proposition. Lord Tenterden, in *Lewis v. Morland* (2 B. & Ald. 64), previous to the decision of *Barker v. Green*, used this language: 'Supposing the sheriff to be guilty of a breach of duty in letting the party out of custody, it does not thence follow that an action can be maintained against him for such breach of duty.' The opinion of Lord Denman, in the case of *Randell v. Wheble*, 10 A. & E. 719, contains this passage: 'We agree with the case of *Brown v. Jarvis*, that it is the duty of the sheriff to arrest the party on the first opportunity that he can; but we also agree with the court in that case that some actual damage must be shown in order to make the negligence of the sheriff in that respect a cause of action.' In a later case the same judge says: 'When the clear right of a party is invaded in consequence of another's breach of duty, he must be entitled to an action against that party for some amount.' *Clifton v. Hooper*, 6 A. & E. 468. Being of opinion that no right of the plaintiff was invaded when the officer departed from his duty in the service and return of the plaintiff's writ of attachment, that he suffered no legal injury until the consequences of that breach of duty were brought home to him by his failure to enforce his execution, that until then he had no right of action whatever, we decide that the statute of limitations took date from the time of the consequential injury, and not from the non-feasance or misfeasance of the officer; and advise that judgment be rendered for the plaintiffs. In this opinion Hinman, J., concurred." And see *post*, § 186, and notes.

And where a sheriff was sued for default by his deputy, and judgment obtained against him, it was held, that the statute began to run against his remedy over against the administrator, on the rendition of the judgment. *Atkins v. Scarborough*, 9 Humph. (Tenn.) 517. Where, by statute, actions on constable's bonds are limited to two years after the "expiration of the time for which the constable is appointed," it was held, that the resignation of the constable, before the expiration of his term of service, did not affect the statute, so that it should begin to run from the resignation. *State v. Ferguson*, 9 Mis. 288. The statute of limitations of Pennsylvania begins to run upon the official recognizance of the sheriff, from its date, and not from its approval by the governor. *Wilson v. Com.*, 7 Watts & Serg. (Penn.) 181. But see *contra*, *State v. Miller*, *ante*, § 88, note. The statute begins to run in favor of the surety on an administration bond from the settlement of the account. *Rives v. Flynn*, 47 Ala. 481. The statute does not begin to run against a claim of the vendee of land purchased at a sheriff's sale, which was void by reason of the irregularity of the sheriff's proceedings, against the sheriff for indemnity, until eviction. *Friedlander v. Bell*, 17 La. Ann. 42. As to when the statute begins to run in cases of tort, see *post*, Ch. XXVII.]

## CHAPTER XIV.

## MUTUAL ACCOUNTS.

143. It has been long well established that mutual accounts, if they contain some items, or any one item, within six years, are not barred by the statute, though the rest of the items are beyond six years. This doctrine has been put upon two different grounds; the first being that such accounts come within the equity of the exception in respect to merchants' accounts, which will be the subject of the following chapter. In reference to this exception was made the decision in *Cranch v. Kirkman*,<sup>1</sup> in which, to an action for goods sold and delivered, a set-off was filed of several items for goods sold at different times. Some of the items on both sides were within six years. It was contended for the plaintiff, that the greater part of the set-off was within the statute. Lord Kenyon thought that this came within the exception as to merchants' accounts, it being in the nature of a running and *mutual* account between the parties; and though the plaintiff's counsel contended that the exception extended to no other description of persons but *merchants*, yet he was overruled by his lordship.

144. Upon the independent ground, the one chiefly and generally relied upon, *Catlin v. Skoulding*,<sup>2</sup> is the leading authority. This ground is, that the items within six years are clearly an *admission* of an unsettled account, and equivalent to evidence of a new promise, which takes all the other items out of the statute. "I take it," says Lord Chief Justice Kenyon, in this case, "to have been clearly settled, as long as I have any memory of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute." This case was cited as authority in

<sup>1</sup> *Cranch v. Kirkman*, Peake, Ca. 164.

<sup>2</sup> *Catlin v. Skoulding*, 6 T. R. 189.

*Cogswell v. Dolliver*,<sup>1</sup> in one of the early reported cases in Massachusetts, in which Sewall, J., said, that it perhaps was not proper to consider the accounts disputed in the case before him as excepted from the statute of limitations, in the name of "mutual" accounts, between *merchant* and *merchant*. It was, however, proper, he said, the jury should take both accounts into consideration, there being on each side charges within six years; and this circumstance he regarded as evidence of a renewed promise, applicable to the whole account. And Sedgwick, J., in the same case, said: "If any of the articles were delivered within six years preceding the commencement of the suit, they will draw after them the articles beyond six years, so as to exempt them from the operation of the statute." A like decision was made in Maine, in which case, however, the court remarked, that though the relaxation of the express provisions of the statute of limitations had been said by eminent judges to have been carried far enough, and might, possibly, in some instances, have defeated the intention of the original law, yet, said the court, they were bound to administer it as qualified by judicial construction.<sup>2</sup> But the doctrine, the court added, was not without reason, and they pronounced it the settled doctrine, both in England and in this country. Here is an intimation that the construction was not quite consistent with the positive terms of the statute, though in itself reasonable and just.<sup>3</sup>

145. But the doctrine of *Cranch v. Kirkman*, and *Catlin v. Skoulding*, was for the first and only time directly repudiated in *Blair v. Drew*, in the Supreme Court of New Hampshire.<sup>4</sup> There was not only, the court in this case said, the earlier decisions, showing that the exception above referred to was then understood and applied in a confined sense, according to its language, but

<sup>1</sup> *Cogswell v. Dolliver*, 2 Mass. 217.

<sup>2</sup> *Davis v. Smith*, 4 Greenl. (Me.) 387.

<sup>3</sup> [By the statute of limitations of Maine, in an action on a mutual and open account current, the right of action for the whole balance is deemed to have accrued at the time of the last item proved in the account. But if a party sleeps on a demand without entering it on his account until the period of limitation is elapsed, he cannot withdraw it from the operation of the statute by entering it afterwards on his account. In cases of unliquidated demands, the statute begins to run when the right of action accrues; but if the parties, after the right of action accrues, come to a settlement, and determine the sum due by mutual agreement, the statute begins to run from the time of the settlement. *Ex parte Storer*, 1 Davies (U. S.), 294. But as to this last point, see *post*, § 150.]

<sup>4</sup> *Blair v. Drew*, 6 N. H. 235.

there was no substantial reason why the statute should not be applied to bar items of account generally, which are more than six years old, as well as to bar promissory notes: there was no greater presumption that the latter have been paid after such lapse of time, than there was that the former had been adjusted; there was more danger of false and unfounded demands upon accounts than upon promissory notes, inasmuch as the latter contain the signature of the party to be charged; and it was more usual to take up and cancel promissory notes, when paid, than it was to take receipts upon accounts, when settled, or to preserve such receipts, when taken; and there was quite as much propriety in a statute of repose in relation to accounts, as there was upon any other branch of the subject-matter of the statute. The court, therefore, relying upon the views of Mr. Justice Story, in giving the opinion of the Supreme Court of the United States in *Bell v. Morrison*<sup>1</sup> (in which is presented in strong terms the danger of permitting an indeterminate and casual admission of the existence of an unsettled account to let in evidence *aliunde* to establish a debt), said they could not hold that one item in an account has of itself any force or effect to take other items, which would otherwise be barred, out of the statute. And for this result, the court also appeal to the principles of repeated decisions of the court;<sup>2</sup> and they rely also upon their belief, that the greater part of the authorities have taken the position to the contrary, rather as matter of precedent than from any intrinsic merit of the principles of either case.<sup>3</sup> But, however forcible might be the above reasoning, were the matter *res integra*, and whatever indirect support it may derive from the general doctrine laid down in the modern cases in respect

<sup>1</sup> *Bell v. Morrison*, 1 Peters (U. S.), 860.

<sup>2</sup> See *Bennett v. Davis*, 1 N. H. 19.

<sup>3</sup> Perhaps, say the court, in *Blair v. Drew*, the decisions in *Cranch v. Kirkman*, and *Catlin v. Skoulding*, were in some measure founded upon opinions which had been held in chancery. They refer to *Scudemore v. White* (1 Vern. 456), where it is laid down, that, "the statute is no plea in bar to an open account," though it does not appear whether the parties were merchants, or upon what principle the decision was founded. It was also stated by the chancellor (19 Ves. 188) that Lord Talbot held "that an open mutual account was within the statute, unless there was some item of charge and debit within six years before the bill; overruling that case" of *Scudemore v. White*. Also, in the case, reference is made to an observation of Lord Hardwicke, "that the exception as to merchants' accounts is not confined to open accounts merely; for between common persons, as long as the account exists, the statute does not bar." Lord Hardwicke, however, seems to have held a different doctrine in relation to the exception (*Wellford v. Liddell*, 2 Ves Sen. 400).

to the effect of admissions and acknowledgments of debts of more than six years' standing, in ordinary cases,<sup>1</sup> to which the court allude, the rule still prevails in this country and elsewhere, that mutual accounts, of however long standing, between persons who do not come within the description of "merchants," are not barred by the statute, if there be any items within six years.<sup>2</sup> Mr. Justice Rogers, in giving the opinion of the court in *Swearingen v. Harris*,<sup>3</sup> in the Supreme Court of Pennsylvania, says, that it was first so decided in *Catlin v. Skoulding*, and has been repeatedly recognized since, as the authorities abundantly show. It takes the case out of the statute, says he, and it is immaterial whether the parties are merchants or not, as it goes on the ground of implied promise.

146. In England, the law upon this subject, as expounded and laid down in *Catlin v. Skoulding*, appears to this day to have undergone no change, and in *Ex parte Seaber*,<sup>4</sup> one of the judges (Sir J. Cross) said, that he had always been so accustomed to consider a running account as taking the case out of the statute, that it was like reverting to first principles to hear such a point debated. It appeared to him that no court of law or equity could possibly reject the evidence of such an account as the one before the court purported to be, "of dealings of the parties running

<sup>1</sup> See Chap. on New Promises and Acknowledgments.

<sup>2</sup> *Coster v. Murray*, 6 Johns. Ch. (N. Y.) 522; s. c. in Johns. (N. Y.) 576; *Rain-chander v. Hammond*, 2 Ib. 200; *Union Bank v. Knapp*, 8 Pick. (Mass.) 96; *Tucker v. Ives*, 6 Cow. (N. Y.) 198; *Chamberlin v. Cuyler*, 9 Wend. (N. Y.) 126; *Edmonstone v. Thompson*, 15 Ib. 559; *Bass v. Bass*, 6 Pick. (Mass.) 364; s. c. 8 Ib. 187; *Ashley v. Hills*, 6 Conn. 248; *M'Clellan v. Croften*, 6 Greenl. (Me.) 308; *App v. Driesbach*, 2 Rawle (Penn.), 287; *Brady v. Calhoun*, 1 Penn. 140; *Moore v. Munro*, 4 Rand. (Va.) 488; *Newsome v. Persons*, 2 Hay. (N. C.) 242; *Davis v. Tiern*, 2 How. (Miss.) 786; *Fitch v. Hillary*, 1 Hill (S. C.), 292; *Taylor v. McDonald*, 2 M'Cord (S. C.) 178; *Kimball v. Brown*, 7 Wend. (N. Y.) 322; *Swearingen v. Harris*, 1 Serg. & Watts (Penn.), 356; *Thompson v. Hopper*, 1 Watts & Serg. (Penn.) 467; *Hay v. Kramer*, 2 Serg. & Watts (Penn.), 187; *Ingraham v. Sherard*, 17 Serg. & Rawle (Penn.), 347; *Beltzhoover v. Yewell*, 11 Gill & Johns. (Md.) 212; *Trumbull v. Stroecker*, 4 M'Cord (S. C.), 215; *Buntin v. Lagow*, 1 Black. (Ind.) 578; *Hibler v. Johnson*, 3 Harr. (N. J.) 266; *Knipe v. Knipe*, 3 Black. (Ind.) 300; *M'Naughton v. Norris*, 1 Hay. (N. C.) 216; *Sumter v. Morse*, 2 Hill (S. C.), 92; *Mandeville v. Wilson*, 5 Cranch (U. S.), 15; *Toland v. Spring*, 12 Peters (U. S.), 300; *Smith v. Ruecaster*, 2 Halst. (N. J.) 357. [*Chambers v. Marks*, 25 Penn. St. 296.]

<sup>3</sup> *Swearingen v. Harris*, 1 Serg. & Watts (Penn.), 356; s. p. in *Thompson v. Hopper*, 1 Watts & Serg. (Penn.) 467, Kennedy, J., dissenting; and see *Hay v. Kramer*, 2 Serg. & Watts (Penn.), 187.

<sup>4</sup> *Ex parte Seaber*, 1 Deacon (Bankruptcy), 551.

on, as it did, within a period of six years." There was, in this case, no question made as to the propriety of the earlier decisions upon the subject under the statute of James, the question being whether the case came within the provision of the statute of 9 Geo. IV. (Lord Tenterden's Act) requiring a new promise or acknowledgment to be in writing. It has more lately been determined in the Court of Exchequer, that where A has an account against B, some of the items of which are more than six years old, and B has a cross-account against A, and they meet, and go through both accounts, and a balance is struck in A's favor, this amounts to *an agreement* to set off B's claim against the earlier items of A's, out of which arises a new consideration for the payment of the balance; and takes the case out of the operation of the statute.<sup>1</sup>

147. It makes no difference upon which side the items within six years are. If there be an item in the defendant's account within six years, it will take the reciprocal account of the plaintiff out of the statute, though the latter contain no item within that period. The rule is the same in respect to both plaintiff and defendant.<sup>2</sup> Where a defendant was sued in 1829, on a demand accruing in 1826, and he proved an account against the plaintiff by way of set-off, consisting of items accruing, some in 1826, others in 1822, and others in 1818; it was held that the items accruing in 1826, drew after them the previous charges, and saved them from the operation of the statute.<sup>3</sup> The provision in the Revised Statute of Massachusetts, that, in actions "to receive the balance due upon a mutual and open account current," the action shall be deemed to have accrued, at the time of the last item proved in such account, does not apply exclusively to such actions as are

<sup>1</sup> *Ashby v. James*, 11 Mees. & Welsb. (Ex.) 542, cited in No. 5, Am. Law Mag. 542. And see *Williams v. Griffiths*, 2 Crompt., Mees. & Rosc. (Ex.) 45; *Mills v. Fowkes*, 5 Bing. New Cases, C. B. (4 Will. IV. to 3 Vict.) 455; *Walker v. Lacy*, 1 Manning & Gr. (C. B.) 54; *Ex parte Peachy*, 1 Deacon (Bankruptcy), 551; *Forbes v. Skelton*, 8 Simons, Ch. 335; *Purden v. Purden*, 10 Mees. & Welsb. (Ex.) 562.

<sup>2</sup> *Ord v. Ruspini*, 2 Esp. 569; *Tucker v. Ives*, 6 Cow. (N. Y.) 195; *Newsome v. Person's Administrator*, 2 Hay. (N. C.) 242; *Davis v. Smith*, 4 Greenl. (Me.) 337; *Mars v. Southwick*, 2 Port. (Ala.) 351.

<sup>3</sup> *Chamberlin v. Cuyler*, 9 Wend. (N. Y.) 126. [*Wilson v. Calvert*, 18 Ala. 274; *Pridgen v. Hill*, 12 Texas, 374; *Pridgen v. McLean*, Ib. 420; *Finney v. Brant*, 19 Mo. (4 Bennett) 42; *Penn v. Watson*, 20 Mo. (5 Ib.) 13; *Helms v. Otis*, 5 Lan. (N. Y.) 137; *Taylor v. Parker*, 17 Minn. 469.]



brought on accounts in which debts and credits are stated, and a balance struck, but extends also to cases in which the plaintiff seeks to recover the balance due to him, though he declares only on the debit side of the account. And, in the latter case, if the defendant does not file an account in offset, nor prove items on his side of the account by way of payment, but relies on the statute, the plaintiff may avoid the statute, by showing that there was a mutual and open account current, and proving an item *on either side*, within six years.<sup>1</sup> The account must be correct upon its face, and the plaintiff cannot enter a credit of recent date which the defendant disavows, without giving proper proof.<sup>2</sup> In Massachusetts, the plaintiff may prove, by his suppletory oath, charges in an account, yet he cannot so prove an item on the credit side of his account, for the purpose of preventing the operation of the statute.<sup>3</sup>

148. The rule that items within six years draw after them other items beyond that period is by all the cases strictly confined to mutual accounts, or accounts between two parties, which show a reciprocity of dealing. Or, in other words, if the items in an account are *all on one side*, as between a tradesman and his customer, and there be some items within six years, but the others are beyond that period, the former will not entitle the plaintiff to give evidence of the latter.<sup>4</sup> The truth is, as stated by Baron Alderson,<sup>5</sup> that the going through an account, with items on both sides, and striking a balance, converts the *set off* into *payments*; the going through an account where there are items on *one side* only, as was the case in *Forty v. Smith*,<sup>6</sup> does not alter the situation of

<sup>1</sup> *Penniman v. Rotch*, 8 Met. (Mass.) 216.

<sup>2</sup> *Taylor's Executors v. M'Donald*, 2 M'Cord (S. C.), 178. And see *post*, Chap. on Acknowledgment of Debts by Part Payment, and *Hibler v. Johnston*, 8 Harr. (N. J.) 266.

<sup>3</sup> *Penniman v. Rotch*, 8 Met. (Mass.) 216; *Hancock v. Cook*, 18 Pick. (Mass.) 80. The admission of the plaintiff's suppletory oath, the court, in the latter case, thought would be extending a local rule of very questionable propriety, contrary to the rule and policy of the common law, and one which courts have always been disposed to restrain within the limits prescribed to it by the usage on which it was founded. Shaw, Ch. J.

<sup>4</sup> Per Dennison, J., in *Cotes v. Harris*, Bull. N. P. 149; *Turnbull v. Stroecker*, Administrator, 4 McCord (S. C.), 214. [*Hallock v. Losee*, 1 Sandf. (N. Y.) Sup. Ct. 220; *Palmer v. City of New York*, 2 Ib. 818; *Guichard v. Supervelle*, 11 Texas, 522; *Judd v. Sampson*, 13 Ib. 19. Mutual accounts imply entries by each party. If there are entries by one party only, there is no mutuality. *Baker v. Mitchell*, 59 Me. 223.]

<sup>5</sup> *Ashby v. James*, 11 Mees. & Welsb. (Ex.) 542.

<sup>6</sup> *Smith v. Forty*, 4 Carr. & Payne, 126. And see, likewise, *Allison v. Pennington*, 7 Watts & Serg. (Penn.) 180 (1844).



the parties at all, or constitute any new consideration. Against the demands of tradesmen and artificers, &c., the prescription runs from the day of each article delivered, or each piece of work done, and the continuation of the supply, or of the work done, does not interrupt it. The claim is composed of as many separate demands as there are parcels of goods and commodities, or performances of distinct pieces of work ; and the statute runs against each from the delivery or the performance.<sup>1</sup> This, however, does not affect the rule that the statute does not begin to run against a demand for a duty to be executed which requires a *continuation* of services, as, for instance, the duty of an attorney to commence and manage a suit, which extends to the completion of the duty.<sup>2</sup>

149. Mutual accounts are made up of matters of *set-off*. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts.<sup>3</sup> A natural equity arises when there are mutual credits between the parties, or where there is an existing debt on one side which constitutes a ground of credit on the other ; or where there is an express or implied understanding, that mutual debts shall be a satisfaction or set-off *pro tanto* between the parties.<sup>4</sup> In *Coster v. Murray*,<sup>5</sup> it appeared that goods in which both parties were interested were sent to the defendant, who agreed to be accountable for the share of the plaintiff, or the proceeds thereof, and to charge no commission on the sale. On the plea of the statute, Chancellor Kent thought there was no account current between the parties,

<sup>1</sup> 1 Evans's Pothier, 419. If, in a continuous account, there are some items accruing within, and others beyond, the time limited by the statute, a payment made within that time and not appropriated will be presumed to be made on the account of the items not barred, so as not to defeat the bar as to the others. But it was held, upon general principles governing indefinite payments, that the creditor might elect, at the trial, to apply the payment to that part of the account which accrued beyond the period of limitation ; but he cannot thereby take out of the statute the excess of that part of the account, over and above the payment. *Mills v. Fowkes*, 5 Bing. (N. Cases) 466 ; *Waller v. Lacy*, 1 Man. & Gran. 54. [In Iowa, "continuous, open, current" accounts, without reference to their mutuality, are barred only from the date of the last item. *Moser v. Crooks*, 32 Iowa, 172.]

<sup>2</sup> *Foster v. Jack*, 4 Watts (Penn.), 384 ; *Rothery v. Mannings*, 1 Barn. & Adol. 15 ; *Harris v. Osborn*, 2 Carr. & Marsh. (N. P.) 629.

<sup>3</sup> *Gordon v. Lewis*, 2 Sumn. (Cir. Co.) 148 ; s. o. *Ib.* 628 ; *Gass v. Stinson*, 8 *Ib.* 628.

<sup>4</sup> Per Story, J., in *How v. Sheppard*, 2 *Ib.* 410. See *Penniman v. Rotch*, 3 Met. (Mass.) 216, and *Strong v. Wright*, 9 Mees. & Welsb. (Ex.) 629.

<sup>5</sup> *Coster v. Murray*, 5 Johns. (N. Y.) Ch. 522.

and no mutual and reciprocal demands. The demand, he said, was all on one side, except it was the charge of expenses and commissions incident to the very subject-matter in question; and he had much doubt, whether it made it a case of mutual accounts within the meaning of the exception. In error,<sup>1</sup> Spencer, Ch. J., held, that, on one part, there was no account at all. It was a case, he said, of a joint purchase of goods, where one of the purchasers takes the whole goods, and is to account for one-third of the profits. In such a case, it was not, in his judgment, within the reason or principle of the exception, which must have intended open and current accounts, where there was mutual dealing, and where there were mutual credits.<sup>2</sup> There must be a mutual, or, as it has been expressed, an "alternate" course of dealing.<sup>3</sup> Where payments on account are made by one party, for which credit is given by the other, it is an account without reciprocity, and only upon one side.<sup>4</sup> If there be one item more than six years old, and the mutual accounts be then commenced, the one time is barred.<sup>5</sup> A shopkeeper's account containing articles sold, some of them within six years before action brought, and also containing credits given more than six years before action brought, is not a mutual account, so that the charges within the six years should draw the previous charges out of the operation of the statute.<sup>6</sup> Where the plaintiff opened an account with the defendant,

<sup>1</sup> 20 Johns. (N. Y.) 576.

<sup>2</sup> See also *Kimball v. Brown*, 7 Wend. (N. Y.) 322; *Chamberlin v. Cuyler*, 9 Ib. 126; *Spring v. Executors of Gray*, 6 Peters (U. S.), 151; *Toland v. Sprague*, 12 Ib. 300; *Edmonstone v. Thompson*, 15 Wend. (N. Y.) 554.

<sup>3</sup> *Fox v. Smith*, 6 How. (Miss.) 346. So expressly held also in *Ingraham v. Sherard*, 17 Serg. & Rawle (Penn.), 347.

<sup>4</sup> *Ingraham v. Sherard*, *supra*.

<sup>5</sup> *Brown on Actions at Law*, Repub. Phila. in No. 133, Law Library, July, 1844. The author cites 2 Saund. 127, note *a*. *Cottam v. Partridge*, 4 Mann. & Gr. 285.

<sup>6</sup> *Gould v. Whitcomb*, 14 Pick. (Mass.) 188. [Payments credited by the plaintiff on account, the defendant keeping no account, does not bring the case within the exception of mutual accounts. *Prenatt v. Bunyan*, 12 Ind. 174; *Dyer v. Walker*, 51 Me. 104; *Peck v. N. Y. Steamship Co.*, 5 Bosw. (N. Y.) 226; *Weatherwax v. Cosumnes*, 17 Cal. 344. Nor will the like credits made by the debtor in a statement of account signed by him. *Dixon v. Lyons*, 13 La. An. 160. Nor does a sale of goods to one holding the note of the vendor. *Clark v. McGuire*, 35 Penn. St. 259. A drawer of bills of exchange which have been accepted for his accommodation by another person, for a commission, cannot create a debt against the acceptor by paying them; and the effect of the statute of limitations upon other dealings between the parties is not avoided by the fact that both parties, for their own convenience, entered such acceptances and payments in their respective books under one general account with their other dealings. *Suckney*

in 1830, and continued to make charges till 1833, and brought an action on his account in 1838, and proved on the trial that the defendant delivered to him an article on account in 1830, it was held that there was an open and mutual account current, and that no part of the plaintiff's charges were barred by the statute.<sup>1</sup> The statute was pleaded, and, on trial of the case, the plaintiff exhibited an account, in which he gave defendant credit for an article within the time limited, and defendant claimed the credit, and examined witnesses to prove it should have been more; this, it was held in North Carolina, was equivalent to keeping an account by defendant against plaintiff, and took the whole account out of the statute.<sup>2</sup> In 1804, the father of B and C delivered to B, in England, £75, with directions to pay the same to C on the latter's arrival in America. In 1818, C came to America, where B was then resident, and accounts on both sides immediately commenced between them, and continued running until 1826. The £75 was charged in the account of C against B. *Held*, that these mutual accounts (*including the £75*) were not within the statute; some of the items in the account having been furnished within the time limited by the statute.<sup>3</sup> A banking firm, who, on opening an account with a customer, had agreed to allow him interest at three per cent on the balances, which, from time to time, should be standing to his credit, set up the statute as a defence to a bill filed against them by the customer for an account. The account, as it stood in the banker's book, showed a considerable balance due to

*et al. v. Eaton*, 4 Allen (Mass.), 108. Accounts between co-partners are mutual. *Bradford v. Spyker*, 32 Ala. 184. The statute only applies to accounts due and payable on the day of entry, and not to accounts for articles sold on credit. *Effinger v. Henderson*, 33 Miss. (4 George) 449. When there are mutual accounts, and the plaintiff brings suit, the defendant may set off so much of his account as accrued within six years prior to the plaintiff's suit. *Rollins v. Horn*, 44 N. H. 591. In an action upon a memorandum given for a sum to be accounted for on settlement, the defendant may offset balances due to him from the plaintiff at its date, though more than six years from the commencement of the action. *Shattuck v. Shattuck*, 16 N. H. 242. And see *ante*, § 75, note. The equitable right of a person to redeem land from a mortgage, under which the mortgagee has entered to foreclose, may be enforced on a cross-bill, although filed by him more than three years after the entry, in a suit in equity brought by a third person against him and the mortgagee, before the end of the three years, to redeem the land from the same mortgage. *Pierce v. Chase*, 108 Mass. 255; *Field v. Schieffelin*, 7 John. Ch. 250.]

<sup>1</sup> *Penniman v. Rotch*, 8 Met. (Mass.) 216.

<sup>2</sup> *Newsome v. Person's Administrator*, 2 Hay. (N. C.) 242.

<sup>3</sup> *Knipe v. Knipe*, 2 Black. (Ind.) 840.

the plaintiff, but there being no item in it, or evidence of any transaction connected with it, of a date within six years prior to the filing of the bill, nor any suggestion in the bill that the bankers were bound by the agreement or otherwise, to have actually entered the interest as it became due to the credit of the customer in the account, or that they had omitted so to do with a fraudulent intent, the defence was allowed to prevail.<sup>1</sup> Where the action was by a hat-maker against his customer, and there were two items of credit; namely, one for money paid by the defendant to the plaintiff, and the other for a hat returned, and there was also an account of a firm, of which the defendant was a member, against the plaintiff, — it was held, that this was not a case of mutual accounts, and therefore that all items above six years' standing were barred.<sup>2</sup>

150. The mutual account must subsist as an open and current account in order to be kept beyond the reach of the statute; for the moment it becomes a *stated* account, it is at an end; and the balance, which is ascertained and admitted to be due, from one party to the other, is immediately subjected to the operation of the statute, as an original and separate demand.<sup>3</sup> By its remaining open, each party is depending for the recovery of the balance he may consider due to him upon the promise which the law raises, on the part of him who is indebted, to pay that balance; but when the parties have stated, liquidated, and adjusted their accounts, and

<sup>1</sup> *Foley v. Hill*, 1 Phillips (Eng. Ch.), 899.

<sup>2</sup> *Hay v. Kramer*, 2 Watts & Serg. (Penn.) 187. [So where A sells goods to B for cash, and other goods to be paid for in goods, and B delivers to A goods more than sufficient to pay for those which he received to be paid for in goods, this is not a mutual account between the parties, so that one item being within six years will take the whole out of the statute. *Lowber v. Smith*, 7 Barr (Penn.), 881. But the items of payments and receipts by two tenants in common concerning their joint estate constitute "an open and mutual account current." *Dickenson v. Williams*, 11 Cush. (Mass.) 258.]

<sup>3</sup> *Webber v. Twill*, 2 Saund, 125, and *Ib.* note 6 to p. 127; *Farrington v. Lee*, 1 Mod. 270; *Martin v. Delboe*, 1 *Ib.* 70. In Scotland, the term of prescription does not begin while the account is current, but only when it is closed. The *terminus a quo*, the period from which the prescription begins to run, is the date of the last article, when the account is closed; or of the article which precedes an interruption in the account. 1 Bell's Com. 251. See also *Ramchanden v. Hammond*, 5 Johns. (N. Y.) Ch. 200, and the authorities cited on p. 132; and see in particular *Toland v. Spring*, 12 Peters (U. S.), 800; and *Spring v. Executors of Gray*, 6 *Ib.* 156; *Purdon v. Purdon*, 10 Mees. & Welsb. (Ex.) 562. [The statute begins to run in cases of adjustment, when the adjustment is made. *Ex parte Storer*, 1 Davies (U. S.), 294; *Higgs v. Warner*, 14 Ark. (1 Barb.) 192; *Brackenbridge v. Bottzell*, 1 Carter (Ind.), 883.]

thus ascertained the balance, it ceases to be an account, and has lost the peculiar attributes of an account. What was before an implied promise to pay what was reasonable, by such liquidation and stating of the account, at once becomes an express promise to pay a sum certain.<sup>1</sup> An account stated, therefore, is a direct or implied agreement between both parties, that all the articles on both sides are true ;<sup>2</sup> and the ascertained and acknowledged balance may be recovered in an action of assumpsit founded upon the fact, that it is admitted by the indebted party, on an adjustment of the respective claims.<sup>3</sup> "All intricacy of account or doubt as to which side the balance may fall is at an end."<sup>4</sup> It is like the account of a guardian exhibiting a balance in his hands, which no longer continues him a trustee, and makes him a debtor for the balance when the ward comes of age ; and he is, therefore, protected by the statute at the end of six years.<sup>5</sup> An account *closed* is not necessarily an account stated and liquidated. It may become closed by the death of one of the parties, which is clearly not a statement, and still less a settlement, or an adjustment of a balance.<sup>6</sup> There may be cases, in which the question, whether an account be both closed and settled, would be proper to be determined by the jury.<sup>7</sup> The mere fact of rendering an account by one party does not give it the character of a stated account. The other party must receive it, and, impliedly at least, admit the correctness of the items. If he claim the balance, or offer to pay the balance, as it may be found in his favor or against him, then it becomes a stated account. It is not important that the account has not been made out between the parties.<sup>8</sup> An account current sent by a foreign merchant in this country, and not objected to for two years, has been held an account stated.<sup>9</sup> In *Toland v. Spring*,<sup>10</sup> T. shipped a quantity of merchandise by P. to Gibraltar, who, on arriving there, placed the goods in the hands of S., and received advances from S. upon them. In 1825, S. sold the goods, and transmitted an account of sales as

<sup>1</sup> Per Chief Justice Mellen, in *M'Clellan v. Croften*, 6 Greenl. (Me.) 887.

<sup>2</sup> See *Davis v. Tiern*, 2 How. (Miss.) 786.

<sup>3</sup> See *Ashley v. Hill*, 6 Conn. 248.

<sup>4</sup> 4 Leigh (Va.), 249.

<sup>5</sup> *Green (Ex'r) v. Johnson*, 8 Gill & Johns. (Md.) 889 ; *Bull v. Townsen*, 4 Watts & Serg. (Penn.) 557.

<sup>6</sup> *Bass, Executor v. Bass*, 6 Pick. (Mass.) 864 ; s. c. 8 Ib. 187.

<sup>7</sup> Ib. *M'Clellan v. Croften*, 6 Greenl. (Me.) 808.

<sup>8</sup> These points held in *Toland v. Spring*, 12 Peters (U. S.), 800.

<sup>9</sup> *Friedland v. Heron*, 7 Cranch (U. S.), 147.

<sup>10</sup> 12 Peters (U. S.), 808.

of the merchandise received from P. to T., who received it in September, 1825, stating the balance of the proceeds to be two thousand five hundred and seventy-eight dollars. T., in 1825, wrote to S., directing him to remit the amount to him, deducting one thousand dollars, which had been advanced by S. on the goods, and which had been remitted by P. to T.: S. refused to make the remittance, alleging that P. was largely indebted to him. No suit was instituted by T. against S. until August, 1834. The account was a *stated* account, and the statute of limitations applied to it.

151. But the balance, when found and assented to, may be the commencement of, and constitute an item in, a new mutual account. Thus it was remarked by Chief Justice North, in one of the early cases,<sup>1</sup> that, "if, after an account stated, upon the balance of it a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new account, it is now *slipped out* of the statute again." The meaning of this declaration is, that the balance forms the first item in the new account, and is a part of it. And if the account is thus renewed and continued, the statute will be a bar to the *items* of the first account, though the balance will be saved. That is to say, if six years have elapsed since the adjustment of the former account, and it should then be found that the balance was incorrect, and an action brought for the recovery of a different balance, the statute may be pleaded. Otherwise, old accounts, which have been once settled, might be the subject of litigation after the lapse of many years. This exposition of the law, as laid down by Chief Justice North, was concurred in by the Supreme Court of the State of Massachusetts, in an action of assumpsit, by a bank against a depositor, to which was pleaded the statute of limitations.<sup>2</sup> It appeared that the usage of the bank was, at the end of every month, to balance the book of a depositor, and to make the balance the first item in a new account. It was held, that, where an account has been balanced, it is no longer an open and running account, and that the parties could not go behind such settlement, without leave obtained, upon a bill in chancery, to inquire whether the balance was founded in error. Putnam, J., who delivered the opinion of the court: "We do not think that the facts of the case at bar prove this account to be open and running from November, 1817, to January, 1824. On the

<sup>1</sup> Farrington v. Lee, 1 Mod. 270.

<sup>2</sup> Union Bank v. Knapp, 3 Pick. (Mass.) 96.



contrary, it is proved that the accounts have been stated and settled monthly. To what is the following account to be added? Not to the former account as it stood, but to the *balance* of the former account, *as it had been settled*. That balance constitutes one of the items of the new account; and if the new account shall run on mutually to a time within six years, that balance, although arising more than six years before, will be saved and drawn out, as it is sometimes expressed, from the operation of the statute, by the charges which are within six years. For example, suppose that the balance of the account stated in November, 1817, had been carried to a new account, which had continued to run on mutually, until January, 1824, without any intervening settlement. In such a case, the law would infer a promise to account for all the items in such new account, and to pay the balance of the same. But this construction will not avail the plaintiff, because the account which was added to the balance of November, 1817, did not continue open and running till January, 1824, but was open and running only for a month at a time. The acknowledgment, which is to be inferred from the mutual and open accounts, within six years, should be limited to the items appearing in the same. If, for example, one of the items should be a sum of money, being the balance of a former account settled more than six years before the action, it would be protected from the operation of the statute, by the items which are within six years. In such a case, the law would infer a promise to settle for all the items of the new account. The promise and acknowledgment may reasonably be extended so far; but not to the various charges and disbursements in former times, from which the balance charged in the open account arose. What of doubt now appears, might in time of the transaction have been explained by papers, vouchers, or witnesses; but it would be doing great violence to go behind the account, which is open and current, and behind a hundred or more stated accounts, to inquire, if, at some former period, during the trade between the parties, perhaps some twenty or forty years ago, a mistake did not happen in one or more of the settlements, which, if corrected, would make the balance constituting one item in the open account to be either too little or too great, or on the other side.”<sup>1</sup>

<sup>1</sup> See also *Ferguson v. Fyffe*, 8 Clark & Finn. (H. L.) 121. [*Clark v. Jenkins*, 3 Rich. Eq. (S. C.) 814].



## CHAPTER XV.

## MERCHANTS' ACCOUNTS.

152. THE words of the exception in the third section of the statute of James, in respect to merchants' accounts, which was referred to in the commencement of the preceding chapter, are, "all actions of account, and upon the case, *other* than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." In the latest revised acts of limitation in this country, this exception has not been retained;<sup>1</sup> but, in those States in which it has been deemed expedient to dispense with it, it might be relied on in respect to causes of action which accrued when the exception was in force.<sup>2</sup>

153. The above exception has, in two rather recent cases, been subjected to technical disquisition, and they have established an interpretation before not clearly settled. According to Erskine, J., in *Cottam v. Partridge*, in the English Common Pleas,<sup>3</sup> the exception seems to have been inserted in order to give merchants the same period of time for proceeding at law, to compel their correspondents or agents to furnish accounts, as they would have had if they had proceeded to enforce an account in equity. The meaning of the words of the exception is not "other than in an action of account," but "other than actions for an account," and refer seemingly to actions strictly brought for an account. The court were all of opinion that the exception was confined to accounts in respect of which the one party might maintain against the other an action of *account*, or an action *upon the case*, for not accounting. In the Court of Exchequer, Baron Parke (in delivering the judgment of the court), in *Inglis v. Haigh*,<sup>4</sup> says, that the exception does not apply to an action of *assumpsit* for the several

<sup>1</sup> It has not been retained, as will appear by referring to the Appendix, in Maine, New Hampshire, Vermont, Massachusetts, Connecticut, New York, Delaware, Ohio, Michigan, Missouri, Arkansas. [Repealed in England 19 & 20 Vict. c. 97, § 9.]

<sup>2</sup> See *ante*, Ch. II. § 22.

<sup>3</sup> *Cottam v. Partridge*, 4 M. & Grang. 290.

<sup>4</sup> *Inglis v. Haigh*, 8 Mees. & Welsb. (Ex.) 769.

items of which the account is composed, or for the general balance, but only to a *proper action of account*, or perhaps also to an action on the case for not accounting. The action was *assumpsit* for work, and labor, and commission, money lent, and on an account stated; the plea, that the action did not accrue within six years; and the replication, merchants' accounts, and that the causes of action were items in an open unsettled account between them as such merchants, and which said account contained various items in favor of the defendant, and the balance due on which said account the plaintiffs sought to recover. The rejoinder was, that no item on either side of the said account accrued due within six years before the commencement of the suit, and that, more than six years before the commencement of the suit, the plaintiffs had stated the said account to the defendant, as the balance thereof in the replication mentioned. There was a general demurrer and joinder. "Although," said Baron Parke, "there is no reported case expressly governing the present, yet there are many coming very near it, and in which the dicta of very eminent judges fully warrant the view we take of the subject." And he cites *Webber v. Tivill*, 2 Saund. 124; *Martin v. Delboe*, 1 Mod. 70; *Farringdon v. Lee*, 1 Mod. 269. The opinion of the court "being, that the replication is bad, it is perhaps not absolutely necessary for us to say any thing as to the rejoinder by which the defendant seeks to get rid of the replication, by saying that all the items of the account are of more than six years' standing. We think it, however, right to say, that in giving judgment for the defendant, we proceed solely on the insufficiency of the replication, and not on the rejoinder." The view of the court "was much assisted by considering that the exception clearly would not apply to an action of *debt*, brought for the very same demand; and it is very difficult to believe that the legislature could have intended to preserve the right in one form of action, but to bar it in another." The court were aware, "that, in confining the exception to actions of account, they were deciding, in some measure, in opposition to what is represented, though not very confidently, to be the law, by Mr. Sergeant Williams, in one of his very learned notes to *Webber v. Tivill*." <sup>1</sup>

154. The question, whether the exception as to merchants' accounts applied to accounts in which there had been no item

<sup>1</sup> See *ante*, Ch. IX. § 69, respecting the action of account.

within six years,<sup>1</sup> is one which has hitherto been the subject of no small degree of litigation, and of conflicting adjudication. On one side, it has been contended that the exception in the statute expressly, and without any qualification, *excludes* merchants' accounts, and that, if the action concerned the trade of merchandise between merchant and merchant, no length of time is a bar, as the exception prevents its application to such a case. On the other side, it is contended, that the exception, even as to merchants' accounts, extends *only* to cases in relation to which there have been some transactions within six years. In a case which was referred to the three judges of the King's Bench, namely, Jones, Croke, and Barkely, respecting an account between two merchants, to which was pleaded the statute of limitations, they certified, that the account was not barred, because the account was not finished, and also because *it was between merchants*.<sup>2</sup> The latter ground certainly seems to favor the construction, that matters of merchandise, between merchants, were not within the statute. This case has, however, been pronounced as too loose, and too concise, and depending too much upon the first ground, to be regarded as of much authority on the present subject.<sup>3</sup> A more direct and weighty authority, in favor of this side of the question, is that of Lord Hardwicke,<sup>4</sup> who said that the exception as to merchants' accounts is to be confined to open accounts merely; for between common persons, so long as the account is continued, the statute does not bar. The exception, therefore, he said, must mean something more; and he seemed to think, that *between merchants*, an open account would do, though there had been no dealing within six years. And it was also observed by Lord Kenyon, that, where there was no item of account at all within six years, the plea of the statute would bar, *unless* the plaintiff could bring his case within the exception concerning *merchants' accounts*, and that then the plaintiff is not bound, though there be no transaction of any kind between the parties for six years.<sup>5</sup> In this case, however, there were credits on each side, within six years; and, therefore, the observations of Lord Kenyon were rather extrajudicial.<sup>6</sup> Other English authorities would much favor the opposite construction,

<sup>1</sup> See preceding chapter.

<sup>2</sup> *Sandys v. Blodwell*, Jones, 401.

<sup>3</sup> Per Chancellor Kent, in *Coster v. Murray*, 5 Johns. Ch. 522.

<sup>4</sup> Referred to by Lord Eldon, in *Foster v. Hodgson*, 19 Ves. 180.

<sup>5</sup> *Catlin v. Skoulding*, 6 T. R. 189.

<sup>6</sup> So considered by Chancellor Kent, in *Coster v. Murray*, 5 Johns. Ch. 522.

that the exception, as to merchants' accounts, extends to *no other accounts* between them than those in relation to which something has been transacted within six years.<sup>1</sup> And Lord Hardwicke gives an opinion on the subject, which is not reconcilable with that which has been referred to. The case does not state that the account concerned merchandise between merchant and merchant, but he observes, "that it was a pretty difficult construction here to apply that exception in the statute relating to merchants' accounts. It is not that the defendant may not plead the statute, in all cases where the account is closed and concluded between the parties, and the dealing and transaction over; *it was not the meaning to hinder that*; but it was to prevent dividing the account between merchants, where it was a running account, when, perhaps, part might have begun long before, and the account never settled, and perhaps there might have been dealings and transactions within the time of the statute."<sup>2</sup> In a bill for an account of mercantile accounts, before Lord Northington, the defendant set up the statute of limitations, and his lordship observed, "that merchants' accounts, after six years' total discontinuance of dealings, were as much within the statute *as other accounts*. The difference," he said, "was, that a continuance afterwards would prevent the statute running against merchants' accounts, but would be a bar to all articles before six years, in other accounts."<sup>3</sup> So, in a bill for an account, and a plea of the statute, with an averment that it was not a merchants' account, before Lord Rosslyn, it was held by his lordship, that the meaning of the exception was, that, if any transaction between the parties took place within six years, none of the transactions should be barred; but that, when all the transactions were over six years, the statute might be pleaded, as well to merchants' accounts as others; and the plea was allowed.<sup>4</sup> Lord Eldon, in a still later case, viewed the point as still unsettled.<sup>5</sup> In this case, the bill was upon an open and running

<sup>1</sup> *Webber v. Tivill*, 2 Saund. 124; *Bridges v. Mitchell*, Gilb. Eq. 224.

<sup>2</sup> He accordingly allowed the plea of the statute. *Welford v. Liddle*, 2 Ves. 400.

<sup>3</sup> *Martin v. Heathcote*, 2 Eden, 169.

<sup>4</sup> *Crawford v. Liddle*, cited by the council in *Jones v. Pengree*, 6 Ves. 580, where the same question was discussed, but the cause went off on another point. The same may be said of *Duff v. East India Company*, 15 Ves. 198, where the question was treated as an open question, but the Master of the Rolls decided the cause on other grounds.

<sup>5</sup> *Foster v. Hodgson*, 19 Ves. 180.

account. The defendant was a banker, and the plaintiff a merchant. There was no settlement or demand for twelve years, and a demurrer was put in founded upon the statute of limitations. Sir Samuel Romilly, among others, contended for the application of the statute. It was observed, that a notion had prevailed, that, by the effect of the exception in the statute, there was no limitation to a suit upon *merchants'* accounts ; but that the meaning was, that, if the last item in the account was within six years, that preserves all the preceding items of debt and credit from the operation of the statute. Lord Eldon said, that the bill had no allegation that the foundation of the suit was accounts relative to *merchandise between merchant and merchant*. He did not, therefore, decide the question, though he took notice of the conflicting decisions, and observed that the doctrine, upon the question, whether the same law that applies to *open accounts* applied also to *merchants'* accounts, was not to be reconciled.

155. But, whatever doubt might have existed in England formerly, on the question, whether the exception as to merchants' accounts applied to accounts in which there has been no item, on either side, for more than six years, that is now entirely set at rest by the decision in the House of Lords, in *Robinson v. Alexander*.<sup>1</sup> That was a case brought by appeal from the Court of Chancery, being a case of merchants' accounts, in which there had been no item, on either side, for a period greatly exceeding six years previous to the filing of the bill. The defendant, by his answer, insisted on the statute of limitations as a bar to the account sought by the bill ; and there is no doubt it would have been a bar, if the exception as to merchants' accounts is confined to cases where there has been some item of account within six years. The Vice-Chancellor held the case to be within the exception in the statute, and the House of Lords, having taken time to consider, affirmed the decree.<sup>2</sup>

156. In the year 1796, to an action on a bond, in the Supreme Court of Pennsylvania, the defendant, by way of *set-off*, offered evidence to show, that after the execution of the bond, and before the commencement of the suit, the plaintiff had become indebted

<sup>1</sup> *Robinson v. Alexander*, 8 Bligh (N. S.), 352.

<sup>2</sup> See also opinion of the court, as delivered by Baron Parke, in *Inglis v. Haigh*, 8 Mees. & Welsb. (Ex.) 781. See also Browne on Actions at Law, 66 ; *Forbes v. Shelton*, 11 Con. Eng. Ch. 466 ; *Crompt. Mees. & Rosc.* 45 ; 8 Sim. Ch. 835.

to him in a sum exceeding the amount of the bond, upon an account still remaining unsettled between them, *as merchants*, concerning the sales of merchandise made by the plaintiff, in parts beyond sea, as *agent* and *factor* for the defendant. To the admission of this evidence, the plaintiff objected, that there was a lapse of more than *seventeen* years since the date of the last item of the accounts, and no proofs given of any subsequent demand of the money proposed to be set off, and that the statute of limitations was a bar. The court, however, were unanimously of opinion, that the accounts, on which the set-off had been claimed, were not barred; and that the Common Pleas had done right in admitting the evidence offered by the defendant.<sup>1</sup> And the Supreme Court of New Jersey, in the year 1793, also held, in a case where the parties were both merchants, and the accounts between them had been of long standing, that, although the last item was entered more than six years before the action, still the account was not barred by the statute of limitations.<sup>2</sup> In this case, the court referred to the opinion of Lord Hardwicke, in the case of *Welford v. Liddle*, which has been cited; and they thought that this opinion was not upon the point in controversy, and was not corroborated, so far as their knowledge extended, by any other authority.<sup>3</sup> In favor of the opposite side of the question, we have a more modern authority, in the Court of Chancery of the State of New York, in 1821.<sup>4</sup> There appeared to be some doubt, in this case, whether the demand was concerning the trade of merchandise between merchant and merchant, within the meaning of the exception. But Chancellor Kent said, if it were admitted to be a case of merchandise between merchant and merchant, yet the sale of the goods, and the receipt of the proceeds by the defendants, and their accountability for them, were all prior to six years before filing the bill; and it became, he said, a very serious question, whether the statute does not apply to such a case. The question, he said, had been much discussed, and had given rise to contradictory opinions and decisions, and seemed not to be definitively settled at Westminster Hall, even to this day. The Chan-

<sup>1</sup> *Stiles v. Donaldson*, 2 Dallas, 284. See also *Brown v. Agnew*, 6 Serg. & Watts (Penn.), 235.

<sup>2</sup> *Franklin v. Camp*, 1 Coxe (N. J.), 196.

<sup>3</sup> It has been already shown that this opinion of Lord Hardwicke has been corroborated by Lord Northington and Lord Rosslyn.

<sup>4</sup> *Coster v. Murray*, 5 Johns. Ch. 522.



cellor then reviewed the before-mentioned English authorities on the subject, and referred to others, and thought the weight of these authorities was very much in favor of *the application of the statute to open merchants' accounts*, when the time is above six years before the commencement of the suit. Upon an appeal to the Court of Errors, one of the judges expressed himself fully of opinion, that the accounts and concerns of the parties related to the trade of merchandise between merchant and merchant, and, on that account, were within the exception; and he concluded his remarks thus emphatically: "I consider such of the English decisions as contravene the construction I have given to the statute as little better than judicial usurpation of legislative authority."<sup>1</sup> In the Court of Appeals of South Carolina, in 1826, the court were inclined to adhere to the inclination of Chancellor Kent, in the case last mentioned, and thought the weight of authority was in favor of the rule that merchants' accounts are barred if there is no item within the time limited, though they admitted there were respectable authorities opposed to it. The court did not, however, decide the point, but observed, that they saw no good reason why merchants and factors, after all dealing between them had ceased, should not as well be entitled to the protection of the statute as other persons. They were as liable, the court reasoned, to the loss of papers and vouchers as other persons; and that all the *reason* which led to the passage of such an act as the statute of limitations would seem to require that they should have the benefit of it.<sup>2</sup>

157. To come down to a later period: in the Supreme Court of Massachusetts, in an action by an executor, the defendant pleaded *non assumpsit* within six years, and the plaintiff replied that the testator and defendant were merchants, the defendant residing in Bordeaux, in France, and the testator in Boston; and that the cause of action arose out of the mutual dealings and accounts of the defendant and the testator as merchants, and wholly concerned the trade of merchandise carried on between them. Upon demurrer, the court, after adverting to the great diversity of opinion there had been as to whether or not mutual accounts between *merchants* came within the statute of limitations if there were none

<sup>1</sup> *Murray v. Coster*, 20 Johns. (N. Y.) 576. See *Kimball v. Brown*, 7 Wend. (N. Y.) 822.

<sup>2</sup> *Van Rhyn v. Vincent*, 1 M'Cord (S. C.), Ch. 810.



of the items within six years, decided, that the statute could not be pleaded in bar to an action upon an open account "concerning the trade of merchandise between merchant and merchant, if there were none." "As the language of the statute," say the court, "is clear, we shall ground our decision upon it." They say, further, "the words are, 'all actions of account and upon the case, *other than* such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants,' shall be commenced within the time limited. Such accounts, then, are not at all within the statute. This is the most natural construction, and, indeed, the only one which the words will allow."<sup>1</sup> In a subsequent case, between the parties in the same court, the question was presented, whether the demand sued, if originally a merchant's account, had not ceased to retain that character. It was insisted, that the death of the testator, more than six years before the commencement of the suit, closed the account between the parties, so that, from that time, the balance then existing became liable to the operation of the statute of limitations, like an *account stated*; which, according to all the authorities, ceases to be a merchant's account, so far as respects the exception in the statute. Parker, C. J., considered there was no authority for this distinction, or for deciding, that the death of one of the parties, the account remaining unsettled, should so change the nature of the demand, as to take it out of the exception in the statute.<sup>2</sup>

A corresponding decision has been made by the Supreme Court of the State of Maine, in which the court held, that whatever the "accounts" are which were intended to be described by the exception in the statute, namely, "other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants," they are in express terms excluded from the operation of the restraining clause; and as effectually as if they had been contained in a proviso at the end of the section, declaring, that as to such accounts, the statute should have no operation or effect whatever. This decision is accompanied and sustained by a learned and elaborate review of English and American authorities.<sup>3</sup>

In the State of Mississippi, in the Court of Errors and Appeals,

<sup>1</sup> Bass, Executor v. Bass, 6 Pick. (Mass.) 864.

<sup>2</sup> 8 Ibid. 187.

<sup>3</sup> M'Clellan v. Crofton, 6 Greenl. (Me.) 808.

the plaintiff, in the case of *Fox v. Smith*,<sup>1</sup> replied that the cause of action was an account between merchant and merchant, concerning the trade of merchandise. The replication the court held to be a good one, where the parties are both merchants at the time the cause of action accrued, if the account be unsettled, current, and mutual; that is, if it arose in a "mutual or alternate course of dealing, consisting of debts and credits," and must also have originated in "articles of merchandise."

158. As to the construction of the Federal Courts: In the Supreme Court of the United States, in the year 1809, the defendant pleaded the statute of limitations to an action of *assumpsit for goods sold and delivered, and for the hire of a slave*. To avoid this plea, the plaintiff, in his replication, relied on an account current of trade and merchandise had between the plaintiff and defendant, as *merchants*. To this replication was a rejoinder, that, in 1799, all accounts between the parties ceased, and that no accounts had existed or been continued since. It was contended, on the part of the plaintiff in error, that the exception in the statute in favor of merchants' accounts applied only to current accounts, where some of the items are beyond and some within the time of limitation; and that if all dealing between the parties had ceased during the time prescribed by the statute, the whole account was barred. And it was also contended, that the replication was repugnant to the declaration, for that money due for the hire of a slave could not be on an account current of *trade and merchandise*. Marshall, Ch. J., who delivered the opinion of the court, held, that it was *not* necessary that *any of the items should come within the time of limitation*; and that the replication was not repugnant to the declaration. No reasons were given by the chief justice, and no authorities were referred to by him.<sup>2</sup> That merchants' accounts were not barred, was a construction, the same court afterwards said, in *Toland v. Spring*,<sup>3</sup> growing out of the very purpose for which the exception was enacted, which was to prevent the injustice and injury which would result to merchants having trade with each other, or dealing with factors, and living at a distance, if the

<sup>1</sup> *Fox v. Smith*, 6 How. (Miss.) 346, 347. See also *Davis v. Tiernan*, 2 Ib. 786.

<sup>2</sup> *Mandeville v. Wilson*, 5 Cranch, 15. The statute of limitations of Virginia, which, it seems, was pleaded in this case, so far as it relates to the exception concerning *merchants' accounts*, is precisely like the English statute of 21 Jac. I.

<sup>3</sup> *Toland v. Spring*, 12 Peters (U. S.), 300. And see also *Spring v. Executors of Gray*, 6 Ib. 151.

act of limitations were to run, where their accounts were open and unsettled ; where, therefore, the balance was unascertained, and where, too, the state of the accounts might be constantly fluctuating by continual dealing between the parties.

159. Though merchants' accounts are not barred by the statute, yet after the lapse of *twenty years*, it is evident that they, like specialties, may be presumed to have been settled. And it is manifest, that where any account, with the exception of one item on the debit side, and one on the credit side, has existed more than twenty years before action brought, the item on the debit side cannot be considered as reviving and "drawing down" the account, especially if it be a small item, not apparently of a mercantile character; and more especially if the defendant has ceased to be concerned in trade.<sup>1</sup>

160. Allowing that an account is such a one as concerns the trade of merchandise between merchant and merchant, yet it must be *current*, and *mutual* or *reciprocal*, agreeably to the rule to be deduced from the authorities cited in the preceding chapter ; and so what was advanced in that chapter, in respect to the running of the statute against the balance when *stated* and acknowledged, will equally apply to accounts between merchants.<sup>2</sup> The doctrine, as laid down by Mr. J. Dennison, in *Cotes v. Harris*,<sup>3</sup> that the clause in the statute of limitations about merchants' accounts extended only to cases where there were mutual accounts and reciprocal demands, will be found to lie at the foundation of all the cases.<sup>4</sup>

161. As to the question, what are *merchants'* accounts, and what accounts concern *merchandise* within the meaning of the statute, it was one upon which the decision entirely depended, in the case of *Spring v. Executors of Gray*, in the Supreme Court of the United States.<sup>5</sup> It arose under the statute of limitations of Maine,

<sup>1</sup> *Hancock v. Cook*, 18 Pick. (Mass.) 80.

<sup>2</sup> [*Brown v. Cullen*, 7 Barr (Penn.), 281; *Thompson v. Fisher*, 18 Penn. St. (1 Harris) 310; *Breckenridge v. Baltzell*, 1 Smith (Ind.), 217.]

<sup>3</sup> *Cotes v. Harris*, Bull. N. P. 149.

<sup>4</sup> Accounts between two parties do not form merchants' accounts within the exceptions, if they be not mutual as well as current, unless there be an implied agreement that one shall be set off against the other; unless in fact an action of account, or case for not accounting, will lie; therefore, mere cross-demands between strangers are not within the exception. *Browne on Actions at Law*, 65, and *Cottam and Another v. Partridge*, C. P. 4 Man. & Grang. 290 (Easter, 1842). And see *Moore v. Strong*, 1 Bing. N. C. 441.

<sup>5</sup> 6 Peters (U. S.), 151.

as copied from the statute of James, and its words are, "all actions of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, &c., shall be commenced." The case was removed from the Circuit Court of the United States for the district of Maine,<sup>1</sup> in which the plaintiffs had replied to the defendants' plea of non-assumpsit, that the accounts and promises mentioned in the declaration arose from such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants; and issue was joined on the replication. The facts were: The master of a ship, who with other members of a mercantile house, were owners of the vessel which he commanded, with the approbation of the firm, signed a bill of lading to deliver certain articles of merchandise, the property of the shipper, at the port of destination of the vessel, "freight to be paid for the goods, as per agreement indorsed." The agreement indorsed was, that the owners of the ship should have, as the freight of the ship, one half of the net profits on the proceeds of the goods, which were to be invested in a return cargo, to be consigned to and sold by the shipper. The proceeds of the outward cargo were received by the shipper, part in goods and part in money; a portion of the cargo having been left unsold by the vessel where they were delivered. *The transaction was made the subject of an account current*, by the owners of the vessel with the shipper of the goods, and a large balance was claimed to be due to them on the said account. The shipment was made in May, 1810; and in May, 1829, a suit was instituted for the recovery of the balance, stated to be due on an *account current*. The defendants (the executors of the shipper) pleaded, and the plaintiffs replied as above mentioned. The plaintiffs admitted that they had no other cause of action than such as arose from the bill of lading, and the contract indorsed thereon. It was held that the bill of lading and the contract were not sufficient to maintain the issue joined on the part of the plaintiffs, in respect to the replication of merchants' accounts. Marshall, Ch. J., who gave the opinion of the court, said that the plaintiffs and defendants were undoubtedly both merchants, but the former were likewise ship-owners. They were the proprietors of vessels which they hired to others for freight. A charter-party, a contract by which the owner lets his vessel to another for freight, he said, does

<sup>1</sup> 5 Mason (Cir. Co.), 505.

not change its character, because the parties happen to be merchants. It is a special contract, whereby a compensation is stipulated for a service to be performed, and not an *account* concerning the *trade of merchandise*. It is no more an "*account*," and no more connected with "*the trade of merchandise*," than a bill of exchange, or a contract for the rent of a house, or the hire of a carriage, or any other single transaction which might take place between individuals who happened to be merchants. An entry of it on the books of either could not change its nature, and convert it from an insulated transaction between individuals into an account concerning the trade of merchandise between merchant and merchant. This must depend on the nature and character of the transaction, not on the book in which either party may choose to enter a memorandum or statement of it. If the court, the learned judge remarked, were to decide the case on the words of the statute, they should not think that the plaintiffs had brought themselves within the exception. They should not consider the action as founded on "such an account as concerns the trade of merchandise between merchant and merchant."<sup>1</sup>

162. Demands for money growing out of the trade of merchandise between merchants may form a part of their mutual dealings;<sup>2</sup> but the exception cannot be applied to transactions between *banking* institutions, for they are embraced neither by the letter nor the spirit of the saving. Moreover, the interest of such institutions, as well as of the public, requires that liquidation of balances between banks should be regular and frequent.<sup>3</sup>

163. In *Foster v. Hodgdon*<sup>4</sup> (where it appears that the dealings were between merchants on the one side, and bankers on the other), Lord Eldon makes the observation: "This bill has no allegation, that the foundation of the suit is accounts between merchants relative to merchandise between merchant and mer-

<sup>1</sup> [So an account between two joint owners of a vessel was held not to be an account between merchant and merchant, or relating to the trade of merchandise, within the meaning of the statute. *Smith v. Dawson*, 10 B. Mon. (Ky.) 112. Nor is an account between partners. *Manchester v. Matthewson*, 8 R. I. 87; *Leavitt v. Gooch*, 12 Texas, 95; *Bradford v. Spyken*, 32 Ala. 134. Nor is a single transaction between two merchants within the exception. *Marseilles v. Kenton*, 17 Penn. St. 238. Nor is an account with several debits for goods, and one credit of cash, such an account. *McCulloch v. Judd*, 20 Ala. 703.]

<sup>2</sup> *Bass v. Bass*, 8 Pick. (Mass.) 187; *M'Clellan v. Croften*, 6 Greenl. (Me.) 808.

<sup>3</sup> *Farmers and Mechanics' Bank v. Planters' Bank*, 10 Gill & Johns. (Md.) 442.

<sup>4</sup> *Foster v. Hodgdon*, 19 Ves. 180.

chant, unless it is considered as alleging that, by implication, from the statement of the character in which the plaintiffs stood, and the business carried on." And his lordship considered that that inference could not be drawn. This observation was cited by the Vice-Chancellor, in *Forbes v. Skelton*,<sup>1</sup> as an authority in deciding, that the account kept by the joint owners of a plantation in Java, which they worked in copartnership with certain merchants and agents at Bombay, to whom they became largely indebted, in respect of moneys advanced and paid for their use, was not a mercantile account within the meaning of the exception in the statute.

164. Accounts between one partner and another, for a settlement of the partnership accounts, do not concern the trade of merchandise between merchant and merchant, and are not embraced by the exception in the statute;<sup>2</sup> and it was held, in a suit in equity, by an executor of one partner against the survivor for an account, that it did not concern merchants' accounts, and so was not within the exception in the statute, respecting such accounts.<sup>3</sup>

165. It seems, indeed, very clear, as it has been declared,<sup>4</sup> that the parties must both be merchants at the time of action accrued; that the account must be a mutual or reciprocal one, consisting of debts and credits; and that it must have originated in articles of merchandise.

<sup>1</sup> *Forbes v. Skelton*, 8 Simmons, 385, and 11 Eng. Con. Ch. 466.

<sup>2</sup> *Coalter v. Coalter*, 1 Rob. (Va.) 7, cited in 8 Am. Law Mag. 210.

<sup>3</sup> *Codman v. Rogers*, 10 Pick. (Mass.) 112.

<sup>4</sup> *Fox v. Fiske*, 6 How. (Miss.) 328.

## CHAPTER XVI.

## TRUSTEES OF PERSONAL PROPERTY GENERALLY.

166. TRUSTS, in their strict and technical sense, are known only in equity; and falling, as they do, in such a sense, within the peculiar and exclusive jurisdiction of a court of equity, the doctrine has been long established, that so long as they subsist they cannot be reached, as between trustee and *cestui que trust*, by the statute of limitations. The doctrine, says Mr. Justice Story,<sup>1</sup> seems to be admitted ever since the great case of *Cholmondeley v. Clinton*.<sup>2</sup> It will be found learnedly and elaborately discussed by Chancellor Kent, in the notable case of *Kane v. Bloodgood*,<sup>3</sup> by which it appears that it has had the full support of Lord Maclesfield and of Lord Hardwicke and his successors, in a series of decisions. The equitable principle upon which the doctrine is founded is succinctly stated by Lord Redesdale, when Chancellor of Ireland. "If a trustee," he says, "is in possession and does not execute his trust, the possession of the trustee is the possession of the *cestui que trust*; and if the only circumstance is, that he does not perform his trust, his possession operates nothing as a bar, because his possession is *according to his title*."<sup>4</sup> To exempt a trust from the bar of the statute, it must be, first, a direct trust; second, it must be of the kind belonging exclusively to the jurisdiction of a court of equity; and, third, the question must arise between the trustee and the *cestui que trust*.<sup>5</sup>

<sup>1</sup> *Baker v. Whiting*, 8 Sumn. (Cir. Co.) 486.

<sup>2</sup> *Cholmondeley v. Clinton*, 2 Jac. & Walk. Ch. 1.

<sup>3</sup> *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90. [*Shibla v. Ely*, 2 Halst. (N. J.) Ch. 181; *Zacharias v. Zacharias*, 23 Penn. St. 452. But see *Jayne v. Mickey*, 55 Penn. St. 260.]

<sup>4</sup> *Hovenden v. Lord Annesley*, 2 Scho. & Lef. Ch. 607. And see *post*, as to the effect of possession of land, as between trustee and *cestui que trust*; and *Trevost v. Gratz*, 6 Wheat. (U. S.) 481.

<sup>5</sup> *Lyon v. Marclay*, 1 Watts (Penn.), 275. [*White v. White*, 1 Md. Ch. Dec. 58; *Thomas v. Brinsfield*, 7 Ga. 154; *Tinnen v. Mebane*, 10 Texas, 248. But it has been recently held, in Mississippi, that the stockholder of a bank, who has not paid his subscription, is in the nature of a trustee for the amount due from him, and cannot plead



167. It was in accordance with the principle stated by Lord Redesdale, and upon the conclusions arrived at from the above-mentioned case of *Kane v. Bloodgood*, and from the case of *Decouche v. Savatier*,<sup>1</sup> *Goodrich v. Pendleton*,<sup>2</sup> and *Coster v. Murray*,<sup>3</sup> in the Court of Chancery of the State of New York, that the chancellor of New Jersey decided, that where A. executed a power of attorney to J. W., and thereby placed her whole property at the disposal of the attorney, with full power to collect her *choses in action*, and to make sale of her goods and chattels, and out of the principal as well as interest of the proceeds, to maintain and support her, with a provision that J. W. should account when required, it was a direct trust, to which a plea of the statute was not applicable.<sup>4</sup> The statute cannot be pleaded by trustees in answer to a charge of breach of trust, to defend them from the consequences of neglecting their duty in having sold an estate charged with the payment of a sum of money, without satisfying that demand. The defendants, the trustees, were

the statute of limitations in bar to a bill by a creditor of the bank to subject the amount to his debt. At all events, the statute does not begin to run till the bank ceases to elect a directory. *Payne v. Bullard*, 23 Miss. (1 Cush.) 88. And where property is held in trust for another, subject to the decision of a claim in suit against the *cestui que trust*, the statute does not begin to run against the *cestui que trust* till the final settlement of the suit. *Soggens v. Heard*, 81 Miss. (2 George) 426. And if a sheriff and a judgment creditor hold money in trust to pay over to other creditors who have appealed from the judgment, they cannot avail themselves of the bar of the statute. *Gay v. Edwards*, 30 Miss. (1 George) 218. A husband intrusted, as her agent, with property given to his wife, cannot set up the plea of the statute on a question of title between them. *Meadows v. Dick*, 13 La. An. 377.]

<sup>1</sup> *Decouche v. Savatier*, 3 Johns. (N. Y.) Ch. 216.

<sup>2</sup> *Goodrich v. Pendleton*, *Ib.* 387.

<sup>3</sup> *Coster v. Murray*, 5 *Ib.* 522. The well-established doctrine, in the courts of chancery of South Carolina, based on the authority of the English chancery, is that the statute of limitations will not bar a demand growing out of a direct trust, but will a demand arising out of a trust raised by implication of law. *Burham v. James*, 1 Speer (S. C.), Eq. 375. The following cases, in the same State, are cited: *Alexander v. Williams*, 1 Hill (S. C.), 522; *Mussey v. Mussey*, 2 Hill (S. C.), Ch. 496; *Tucker v. Tucker*, 1 M'Cord (S. C.), Ch. 176; *Miller v. Mitchell*, Bail. (Court of Appeals, S. C.) 487. [*Presley v. Davis*, 7 Rich. Eq. (S. C.) 105.] In Massachusetts, *Farnham v. Brooks*, 9 Pick. (Mass.) 212. In Pennsylvania, *Finney v. Cochran*, 1 Watts & Serg. (Penn.) 118; *Walker v. Walker*, 16 Serg. & Rawle (Penn.), 379; *Lyon v. Marclay*, *supra.* [*McDowell v. Goldsmith*, 6 Md. 819; *Prewett v. Buckingham*, 28 Miss. (6 Cush.) 92; *Paff v. Kenney*, 1 Bradf. (N. Y.) 1; *Carter v. Bennett*, 6 Fla. 214; *Manton v. Titsworth*, 18 B. Mon. (Ky.) 582; *Blount v. Robeson*, 8 Jones, Eq. (N. C.) 73; *West v. Sloane*, *Ib.* 102; *Sagles v. Tibbitts*, 5 R. I. 79; *Martin v. Bank*, 81 Ala. 115; *Marsh's Executors v. Oliver's Executors*, 1 McCarter (N. J.), 259.]

<sup>4</sup> *Administrators of Allen v. Wooley*, 1 Green (N. J.), Ch. 209.

stakeholders of a fund, with knowledge of the claims which existed against it, and that was averred in the bill, as well as that they had recognized the plaintiff's claim.<sup>1</sup> The statute does not run against the creditor of a bankrupt, as a commission of bankruptcy constitutes a trust for all the creditors. This was held by the Master of the Rolls,<sup>2</sup> and afterwards, on appeal, the decision was confirmed by the Lord Chancellor,<sup>3</sup> who said, that the effect of the commission clearly was to vest the property in the assignees for the benefit of the creditors; and that they, therefore, were in fact trustees; and that it is an admitted rule, that, unless debts are already barred by the statute of limitations when the trust is created, they are not afterwards affected by lapse of time. The principle has been lately applied to the insolvent act of Massachusetts. The statute does not run against a claim upon an insolvent debtor, after the publication of the messenger's notice of the issuing of a warrant against the debtor, under statute, 1838, c. 163. A claim, not barred by that statute, when such publication is made, may be proved at a meeting of the creditors, held after it would otherwise have been barred.<sup>4</sup>

168. The most common mode of creating direct trusts, not cognizable at law, is by the appointment and qualification of executors and administrators. Executors who are precluded from taking beneficially, and administrators claiming merely as such, cannot, by virtue of lapse of time merely, set up a title to the

<sup>1</sup> *Milnes v. Cowley*, 4 Price (Ex.), 108.

<sup>2</sup> *Ex parte Ross in re Coles*, 2 Glyn. & Jam. 46 (in 1825).

<sup>3</sup> *Ibid.* 330 (in 1827).

<sup>4</sup> *Minot v. Thacher*, 7 Met. (Mass.) 848. It seems that after an insolvent debtor made an assignment of his property, under statute 1836, c. 238, the statute of limitations ceased to run against the claims of those who were his creditors at the time of the assignment. *Willard v. Clark*, *Id.* 435. [Prescription is interrupted by a *cessio bonorum* made by the debtor. *West v. Creditors, &c.*, 1 La. An. 365. And see *Heckert's Appeal*, 24 Penn. St. 482. So also by bankruptcy. *In re Eldredge et al.* U. S. D. C. East Dist. Va. 12 N. B. R. No. 12, 1875. Nor is the statute applicable to the account of a guardian against his ward, while the relation subsists; and, after its termination, lapse of time will not bar the guardian's claim where the delay is sufficiently explained by the circumstances of the case. *Kimball v. Ives*, 17 Vt. 430; *Mathes v. Bennett*, 1 Foster (N. H.), 204. By the Rev. Stat. of Massachusetts, c. 68, § 20, where assets come into the hands of the administrator of an insolvent estate, after the closing of the commission of insolvency, the commission may be opened, and the claim of a creditor, in whose favor the commission is thus opened, is not barred by any of the statutes of limitation in consequence of the lapse of time subsequent to the closing of the first commission. *Ostram v. Curtis*, 1 Cush. (Mass.) 461; *Sharts v. Same*, *Id.*]

general residue. Being simply and technically trustees, there is no principle of equity, which, upon that single consideration, can admit of their holding to the exclusion of the parties beneficially entitled.<sup>1</sup> In the ecclesiastical courts, which, in England, have had jurisdiction of personal legacies, a plea of the statute has not been heard of; nor have the courts of common law interfered to coerce their reception of it. Chancery, which took cognizance of legacies when charged on land, or where the jurisdiction was incidental to some other species of relief, and has latterly almost engrossed them, adopted the same rule.<sup>2</sup> The retention of the funds, according to the principle as above stated by Lord Redesdale, supplies no argument, inasmuch as that is consistent with the character they sustain, and does not, in consequence, excite any suspicion of an intention to appropriate the funds.<sup>3</sup> Though they have the legal right to the possession of the personal estate, it is for the purpose of lawfully administering it for the benefit of all concerned; but very far from the purpose of concealing it from the knowledge of those persons, and clandestinely appropriating it to their own use in violation of their duty. In such cases of extreme delinquency, and gross breach of faith, they may be held to answer under oath to the proper tribunal (a court of probate), respecting their appointment, the nature and value of the property of which the testator or intestate died possessed, after the lapse even of thirty years since the transactions inquired into.<sup>4</sup>

<sup>1</sup> *Arden v. Arden*, 1 Johns. (N. Y.) Ch. 814; *Decouche v. Savatier*, 8 Ib. 816; *Dunden v. Gaskill*, 2 Yeates (Penn.), 271; *Ward v. Ruder*, 2 Harr. & McHen. (Md.) 154; *Dillebaugh's Estate*, 4 Whart. (Penn.) 177. [Norris's Appeal, 71 Pa. St. 106.]

<sup>2</sup> Per Sergeant, J., in *Thompson v. M'Gaw*, 2 Watts (Penn.), 161. See also opinion of Washington, J., in *Wisner v. Barnet*, 4 Wash. (Cir. Co.) 681.

<sup>3</sup> *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90.

<sup>4</sup> *O'Dee v. McCrate*, 7 Greenl. (Me.) 467. The original complaint made to the judge of probate, upon which the decree appealed from was passed, is founded upon the twenty-fourth section of the statute of 1821, by the first paragraph of which each judge of probate within his county is empowered to call before him and examine on oath any person suspected by an executor, administrator, heir, &c., of having concealed, &c., any of the money, goods, or chattels left by the testator or intestate. The same section provides that, on his refusal to be examined and answer, the judge of probate may commit him until he shall consent to be examined. In the case of *the Selectmen, &c. v. Boylston* (4 Mass. 818), the court thought it questionable whether an executor or administrator could, under any circumstances, be liable to an examination, pursuant to the provisions of the statute, but if he were, the authority of the court extended only under it to an examination for the purpose of discovery; that no other power was given by the statute; and that, to that extent, it was analogous to the power exercised by the English Court of Chancery upon a bill for dis-

So the claim of a widow for her interest in one third of the purchase-money of her husband's real estate, sold by an administrator, is not barred by the statute of limitations.<sup>1</sup>

169. Where the lands of a testator are not liable for the payment of debts on simple contract, if a testator charges his lands with payment of all his debts, the lands are not liable by the law, but under and by operation of the will. Sometimes the devise is to trustees to sell, and sometimes to executors to sell; in such cases the Court of Chancery, having cognizance of trusts, the matter is cognizable in that court; and as the lands are given to the executors, to sell for the purpose of paying debts, they are considered trustees for the creditors, whether called trustees or not, and the creditor and executor being strictly in the relation of *cestui que trust* and trustee, the statute of limitations does not run between them.<sup>2</sup> In *Hughes v. Wynne*,<sup>3</sup> it was considered, that when real estates are devised in trust for payment of debts, in aid of the personal estate, the statute does not run after the death of the testator; and in *Hargreaves v. Mitchell*,<sup>4</sup> that it does not run after the death of the testator, in case of a trust or charge for the pay-

covery. The twenty-third section of the same statute declares that the several judges of probate are empowered to convene before them any person intrusted by any executor or administrator with any part of the estate of the testator or intestate who shall refuse, upon citation, to appear and render a full account upon oath. Taking both the foregoing provisions into consideration, the court, in *O'Dee v. McCrate*, did not receive any substantial objection to the exercise of the power given in the twenty-fourth section, in the case before them. In *Higbee v. Bacon* (7 Pick. 14), the court entertained no doubt that an executor or administrator is liable to an examination on oath upon complaint of those interested. When the same parties were again before the court (8 Pick. 484), the chief justice says: "It should be recollected that an administrator is a trustee, accepting the trust voluntarily, and so having no right to complain of the liabilities of the trust." "The same principle," say the court, in *O'Dee v. McCrate*, "is equally applicable to an executor. An honest man, whether an executor, administrator, or private individual, has no occasion to avoid or to fear such an examination. He is merely called upon to state the truth under oath."

<sup>1</sup> *Dillebaugh's Estate*, *supra*. [But where an administrator had taken the advice of the ordinary, and accounted before him, and divided the estate in good faith, according to the direction of the ordinary, it was held that the statute of limitations began to run in favor of the administrator against the distributees from the time of the division. *Payne v. Harris*, 8 Strobb. (S. C.) Eq. 89. The statute does not begin to run in favor of a former guardian, on the appointment of a new one, until his accounts are finally settled. *Haggerty v. Scott*, 10 Texas, 825.]

<sup>2</sup> See opinion of Huston, J., in delivering the opinion of the court in *Man v. Warner*, 4 Whart. (Penn.) 477.

<sup>3</sup> *Hughes v. Wynne*, 1 Turn. & Russ. Ch. 807.

<sup>4</sup> *Hargreaves v. Mitchell*, 2 Madd. 826, cited in Chitty and Hulme on Bills, 617.

ment of debts.<sup>1</sup> But in *Scott v. Jones*, in the House of Lords,<sup>2</sup> it was held, that a debt which was not barred at the death of a testator may become so afterwards, as to the executors and legatees, notwithstanding a charge by the testator of his debts upon his *personal* estate; and that the operation of the statute will not be prevented, though the testator, erroneously supposing part of his personal estate to be real estate, has so described it in his will, and charged his debts upon it. Had it been real estate in this case, the plaintiff would have been entitled to recover; and the question having been, whether a trust of this description declared of the personal estate, prevents the statute of limitations being set up, Lord Lyndhurst was clearly of opinion that it did not. The executors, he said, take the estate subject to the claim of the creditors; the trust, he said, was a legal trust. Lord Cottenham (Chancellor) adopted and acted upon this judgment, in *Freak v. Cranefeldt*.<sup>3</sup> As to so much of the bill, says Chancellor Walworth, of New York, in *Souzer v. De Meyer*,<sup>4</sup> "as asks for a discovery and satisfaction of that part of the legacies which was not charged upon the land, I apprehend the statute would be a valid bar."

170. In those States, however, where by statute *actions at law* may be brought against executors and administrators, and a limitation is fixed to those actions, the rule in equity is dispensed with,<sup>5</sup>

<sup>1</sup> [*Greenwood v. Greenwood*, 5 Md. 334; *Bagler v. Dejunette*, 13 Gratt. (Va.) 152; *Harris v. King*, 16 Ark. 122. So far as the debts can be satisfied out of the lands charged; but the statute does not run as to the other property of the testator. *Gibbs v. Cunningham*, 4 Md. Ch. 322. But a proviso in a will to sell real and personal estate to pay debts does not create such a trust in favor of debts maturing after the testator's decease as to prevent the running of the statute. *Martin v. Gage*, 5 Selden (N. Y.), 398. A testator, by his will, directed that the interest he had in certain lots be sold, and the proceeds applied to the payment of legacies and the discharge of his debts. He also directed his executors to keep a certain other estate together until all his debts and legacies were paid off and discharged, and out of the proceeds of that other estate to pay a specified sum annually to his wife; and in another clause of the will he provided that this estate should not be divided until the debts and legacies were paid. It was held that the will did not create a trust, by implication, in favor of creditors, which would take a debt due by the deceased out of the statute of limitations. *Carrington v. Manning*, 18 Ala. 611.]

<sup>2</sup> *Scott v. Jones*, 4 Clark & Fin. 883.

<sup>3</sup> *Freak v. Cranefeldt*, 8 Myl. & Gr. Ch. 499.

<sup>4</sup> *Souzer v. De Meyer*, 2 Paige (N. Y.), Ch. 577.

<sup>5</sup> *Kane v. Bloodgood*, *supra*; *Wisner v. Barnet*, 4 Wash. (Cir. Co.) 639; *Souzer v. De Meyer*, 2 Paige (N. Y.), Ch. 574; *Riddle v. Mandeville*, 5 Cranch (U. S.), 322; *Buchan v. James*, 1 Speer (S. C.), Eq. 375.

unless in cases of fraud and concealment.<sup>1</sup> The limitation is not created for their personal convenience, but for the benefit of the estate of the persons deceased, or for those interested in them; and hence, though an executor or administrator is not bound to plead the general statute, yet he is bound to plead the statute which applies to him in that capacity.<sup>2</sup> Therefore, where a license

<sup>1</sup> See *O'Dee v. McCrate*, *supra*; and *post*, Chap. XVIII. [And in Arkansas the statute applies as well to claims of non-residents as residents. *Errom v. Turner*, 1 Eng. (Ark.) 14. The statute of limitations of Pennsylvania is not a bar to an action against an administrator founded upon a *devastavit*. *Williams v. Freeman*, 7 Watts & Serg. (Penn.) 359.]

<sup>2</sup> *Brown v. Anderson*, 13 Mass. 203; *Gookin v. Sanborn*, 3 N. H. 491. See also *Scott v. Hancock*, 13 Ib. 162; *Thompson v. Brown*, 16 Ib. 172; *Dawes v. Shed*, 15 Ib. 6; *Ex parte Allen*, 15 Ib. 58. Whether one administrator may charge the estate by refusing to plead the statute, although his co-administrator insists on pleading it, *dubitantur*. *Scall v. Wallace*, 15 Serg. & Rawle (Penn.), 231. [And see *post*, § 285, n.] If one administrator remain neutral, the other may plead the statute. *Ibid*. If there are several defendants' administrators, and all plead the statute, one of them examined as a witness by the plaintiff, without objection, cannot be asked whether it was his intent to plead the statute. *Ibid*. The statute limiting suits against executors begins to run from the time of the defendant's accepting the trust, and not from the time of giving public notice of his acceptance. *Sewall v. Valentine*, 6 Pick. (Mass.) 276. Such statutes may be pleaded in bar to a suit in equity, as well as at law. 8 Ib. 108. The fact of the plaintiff's having been under the disability of infancy, during the time that the estate of the deceased was under administration, will not prevent his claim from being barred by the lapse of four years, such being the time limited. *Hall v. Bumstead*, 20 Ib. 2. The revised statutes of New York provide that the term of eighteen months after the death of any testator or intestate shall not be deemed any part of the time limited by law for the commencement of actions against executors or administrators. In *Wenman v. Mohawk Insurance Company*, 13 Wend. (N. Y.) 267, it was urged by the counsel for the plaintiff in error that the section containing this provision has reference to the thirty-fourth section (see App. lxiii.), which provides for a fresh suit within one year against heirs, executors, and administrators, where the defendant dies *pendente lite*; the effect of which construction would be to give to the plaintiff, in such cases, two years and six months, after letters testamentary or of administration granted, within which to bring a suit. The court, by Nelson, J., considered that the two sections aimed at different objects and were consistent; and that the object of the section first above referred to (the eighth section) was to give to a creditor, upon the death of a debtor, from whom a subsisting debt was due at the time of his death, eighteen months within which to bring a suit. [An actual presentment of a claim against the estate of a deceased person, or something equivalent thereto, is necessary to prevent the operation of the statute of limitations; and the knowledge of the existence of the claim on the part of the executor or administrator, no matter how full and complete, will not dispense with such presentation. The rule is the same at law and in equity. *Jones v. Lightfoot*, 10 Ala. 17. And the institution of a suit, and the voluntary submission to a nonsuit therein, is not such a presentation of a claim as will prevent the running of the statute. *Dilbone v. Moorner*, 14 Ala. 426. But if nonsuit compulsory, *quære*. *Ibid*. An administrator *ad colligendum* is not such a representative of the estate, that



is granted to an administrator to sell real estate of a deceased, to pay a debt barred by the statute respecting executors and administrators, it is void.<sup>1</sup> The limitation is strictly applicable to demands of creditors of the deceased, and does not reach claims on specific property which was held in trust by the deceased for other persons, and which has come into the hands of an executor or administrator.<sup>2</sup>

171. Though the statute of limitations does not apply in some cases in matters of *account*, courts of equity refuse to interfere after a considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice, when the original transactions have become obscure by lapse of time, and the evidence may be lost.<sup>3</sup> In *Hercy v. Dinwoody*,<sup>4</sup> the statute could not directly apply, for there had been a decree for an ac-

a presentation can be made to him effectual against the statute. *Erwin v. Bank of Mobile*, 14 Ala. 367. A and B took out letters of administration, and D presented a claim in due season, which was allowed. Subsequently the letters were revoked, and afterwards, in 1848, the same persons were reappointed. D commenced a suit on his claim in 1851. Held, that the first presentation was valid, and that the statute began to run from the last appointment. *Brown v. Hill*, 26 Miss. (4 Cush.) 698, and 27 Miss. 44. Under the statute of New York (2 R. S. 89, § 88), requiring a creditor to sue for a debt within six months after it is disputed or rejected by the executor or administrator, the creditor is not barred by the lapse of six months after the mere neglect of the executor to pay a just debt, or even a refusal to pay upon any other ground than that the debt claimed, or some part thereof, is not legally or equitably due. *Kidd v. Chapman*, 2 Barb. (N. Y.) Ch. 414. And this provision is only applicable to cases where the presentment and rejection of the claims are after the publication of notice requiring creditors to present their claims. *Whitmore v. Foose*, 1 Denio, 159. In such cases a presentment of the claim to the legal adviser of the executor or administrator in settling claims against the estate, and his rejection of it, is not a compliance with the statute. *Ibid.* In Massachusetts an executor is not liable, as such, after the expiration of four years from the time of giving his bond, to an action on a covenant of warranty in a deed from his testator; although the covenant is not broken until after the expiration of four years; and although the executor is also residuary devisee and legatee, and gives bond for the payment of the testator's debts and legacies, and takes the assets to himself without filing an inventory. *Holden v. Fletcher*, 6 Cush. (Mass.) 235. The statute begins to run upon orders of the court made pending the settlement, when the final settlement of the administrator's account is had, and he is discharged. *Tindall v. McMillan*, 38 Texas, 484.]

<sup>1</sup> *Parkman v. Osgood*, 3 Greenl. (Me.) 17.

<sup>2</sup> *Johnson v. Ames*, 11 Pick. (Mass.) 178.

<sup>3</sup> See *ante*, § 11. [A bill asking for an account, filed more than five years after settlement with trustee, held barred. *Britton v. Lewis*, 8 Rich. Eq. (S. C.) 271. An action for an accounting by the executors of a deceased partner is barred in six years from the decease. *Knox v. Gye*, L. R. 5 H. of L. (Eng. & Ir. App.) 656. But see *Gleason v. White*, 34 Cal. 258.]

<sup>4</sup> Bro. Ch. 257.



count that had not been proceeded in with effect; and it was, therefore, a case in which the court proceeded according to its discretion. Lord Alvanley, putting his decision on the ground of public policy, refused to permit the account to be carried on, because the party *who would otherwise have been entitled to it*, had been guilty of such *laches* as to render it impossible to settle the account accurately. Chief Justice Taney, in giving the opinion of the Supreme Court of the United States, in a case analogous,<sup>1</sup> says: "In relation to this claim, it appears that nineteen years and three months were suffered to elapse, before any application was made for the execution of the trust by which it had been secured. No reason is assigned for this delay; nor is it alleged to have been occasioned in any degree by obstacles thrown in the way by the appellant. As the record stands, it would seem to have been the result of mere negligence and laches. The rule upon the subject, he said, must be considered as settled by that court, in *Piatt v. Vattier*.<sup>2</sup> It is a rule, that legatees become trustees for the creditors of the testator where there is a deficiency of assets to pay all the debts, if any of the latter have been paid more than their proportion; and they may be compelled in equity to refund and contribute in favor of the unpaid debts at the instance of creditors.<sup>3</sup> It has been held by the Court of Chancery, of South Carolina, that the lapse of less than twenty years after a legatee has been put in possession of his legacy will protect him against the claims of a creditor, if aided by circumstances of negligence of the creditor in pursuing the executor (who is liable to be sued at law), if he has become insolvent, and the debt has been lost in consequence.<sup>4</sup>

172. Long forbearance to make the demand for unpaid legacies affords the *presumption*, either that the claimant was conscious the legacy has been satisfied, or that he intended to relinquish it.<sup>5</sup> But to parties who are ignorant of their rights, and who waived the interest on the sums due before filing their bill, an account

<sup>1</sup> *M'Knight v. Taylor*, 1 How. (U. S.) 161.

<sup>2</sup> *Piatt v. Vattier*, 9 Peters (U. S.), 416.

<sup>3</sup> 1 Story's Eq. Jur. § 508.

<sup>4</sup> *Smith v. Collins*, 1 Bail. Eq. (S. C.) 70. See *Riddle v. Mandeville*, 5 Cranch (U. S.), 322-330. [And see *ante*, § 25, note.]

<sup>5</sup> *Higgins v. Crawford*, 2 Ves. Jr. 572; *Parker v. Ash*, 1 Vern. 256; *Thompson v. M'Gaw*, 2 Watts (Penn.), 161.

was allowed after a very considerable time.<sup>1</sup> And where money had been applied to a charity for thirty-five years, a bill by the heir and next of kin was sustained.<sup>2</sup> Each case depends upon its circumstances and the discretion of the court.<sup>3</sup>

173. As is stated by an eminent author, it is clear by the common law, that in cases of a mere pledge, if a stipulated time is fixed for the payment of the debt, and the debt is not paid at the time, the absolute property does not pass to the pledgee.<sup>4</sup> If the pawnee, he adds, does not choose to exercise his acknowledged right to sell, he still retains the property as a pledge, and upon a tender of the debt, he may at any time be compelled to restore it; for prescription, or the statute of limitations, does not run against it.<sup>5</sup> But as it is laid down by the learned writer in question, and by others, after a long lapse of time, if no claim for a redemption is made, the right will be deemed to be extinguished; and the property will be held to belong absolutely to the pawnee. A court of equity, under such circumstances, will decline to entertain a suit for redemption; and a like rule is adopted in the common law in relation to mortgages.<sup>6</sup> If no time be fixed for the redemption, the pawner has his whole life to redeem, unless he is previously quickened, as he may be, through the instrumentality of a court of equity, or by notice *in pais* to the party.<sup>7</sup>

<sup>1</sup> *Pickering v. Lord Stafford*, 2 Ves. Jr. 584; *Hercy v. Dinwoody*, 2 Ib. 89; *Jones v. Tubeville*, 1 Ib. 18; s. c. 4 Bro. C. C. 114; *Preston on Legacies*, 279.

<sup>2</sup> *Pickering v. Stafford*, *supra*.

<sup>3</sup> *Ibid.*; *Trescot v. Long*, 2 Ves. Jr. 620. [Where a bill was filed in 1845, to recover a legacy given by the will of a testator, who died in 1791, and it did not appear that any effort had ever been made to recover the legacy before, though a bill had been filed in 1818 by the executor of another legatee under the same clause of the same will, on which the final decree was made in 1845, it was held, that the lapse of time was a bar to the recovery of the legacy. *Anderson v. Burwell*, 6 Gratt. (Va.) 405. And so too the claim of a distributee. *Smith v. Calloway*, 7 Blackf. (Ind.) 86.]

<sup>4</sup> *Story on Bailments*, 235. And see the subject very fully and learnedly expounded by Kent, J., in *Cortelyou v. Lansing*, 2 Caines's Cases in Err. 200. And see *Yelv.* 178; *Glanville*, Lib. 10, c. 6.

<sup>5</sup> *Kemp v. Westbrook*, 1 Ves. Ch. 278. This is agreeably to the Roman Law (*Story, supra*), and commentators on the civil law by him cited. See also *Slaymaker v. Wilson*, 1 Penn. 216.

<sup>6</sup> *Story, supra*, and *Powell on Mortgages*, and *Coventry* on same, *Rand's ed.*, *Coventry's note*, 401.

<sup>7</sup> See opinion of Kent, J., in *Cortelyou v. Lansing, supra*; and authorities cited by *Story, supra*, namely, *Hart v. Ten Eyck*, 2 Johns. (N. Y.) Ch. 62; *Garlick v. James*, 12 Johns. (N. Y.) 146; 2 Kent's Comm. Lect. 10, p. 582, 8d ed. [In Missouri, where

174. Though it has invariably been maintained, that the statute of limitations does not apply directly to trusts of the nature above considered, yet it has ever been as invariably maintained, that if a trustee should deny the right of his *cestui que trust*, and assume absolute ownership of the property he holds in trust, he abandons his fiduciary character, and the *cestui que trust* must commence legal proceedings against him within six years therefrom.<sup>1</sup> It was held that the statute does not run in favor of a master in equity, against an account for the proceeds of property sold by him in his official capacity, until a demand on him by the party entitled, or notice by him to the party that he claims *adversely*.<sup>2</sup> When, says Mr. Justice Story, it is said that the statute of limitations does not apply to cases of trust, it is material to consider the sense in which that proposition is to be understood. He then says, that, even in cases of express trusts, if an open, public adverse claim is set up, the trustee against his *cestui que trust*, and the trust itself is denied as any longer subsisting, there is much reason to hold, that the bar ought to be admitted to arise from that period. Certain

a slave was loaned, and held by the bailee five years without any demand, and was afterwards sold by the bailee to one who knew the circumstances of the bailment, it was held that the vendee had a good title. *Cook v. Clippard*, 12 Mo. 879. On the other hand, in *Weeks v. Weeks*, 5 Ired. (N. C.) Eq. 111, it was held, that one who had received slaves from his father, or father-in-law, under a parol gift or loan, was but a bailee and could not avail himself of the statute of limitations.]

<sup>1</sup> *Kane v. Bloodgood*, *supra*, and the numerous authorities therein cited. *Farnam v. Brooks*, 9 Pick. (Mass.) 212; *Decouche v. Savatier*, *supra*; *Pipher v. Lodge*, 4 Serg. & Rawle (Penn.), 810; *Boone v. Chiles*, 10 Peters (U. S.), 223; *Willison v. Watkins*, 3 Ib. 52; *Green v. Johnson*, 3 Gill & Johns. (Md.) 389. [*Murdock v. Hughes*, 7 S. & M. (Miss.) 219; *Starke v. Starke*, 8 Rich. (S. C.) 438; *Perkins v. Cartnell*, 4 Har. (Del.) 270; *Coleman v. Davis*, 2 Strobb. (S. C.) Eq. 394; *Soller v. Croft*, 7 Rich. Eq. (S. C.) 34; *Dean v. Dean*, 1 Stockt. (N. J.) 425; *Sheldon v. Sheldon*, 3 Wis. 699; *Cunningham v. McKindley*, 22 Ind. 149; *Robson v. Jones*, 27 Ga. 266; *Andrews v. Smithwick*, 20 Texas, 111; *White v. Leavitt*, Ib. 703; *Smith v. Ricordo*, 52 Mo. 581; one who has held as bailee, under the like circumstances, may plead the statute. *Lucas v. Daniels*, 34 Ala. 188. But the statute does not run in favor of the trustee after a disavowal of the trust, if the *cestui que trust* be under undue influence proceeding from the trustee. *Keaton v. McGiveen*, 24 Ga. 217; *Wellborn v. Rogers*, Ib. 558. And see also *Wheeler v. Piper*, 8 Jones, Eq. (N. C.) 249. But it should appear that the *cestui que trust* had knowledge of the trustee's denial, repudiation, or adverse claim, and that the trustee has been guilty of no fraud; and then the statute begins to run from the refusal. *Keaton v. Greenwood*, 8 Ga. 97; *Moffatt v. Buchanan*, 11 Humph. (Tenn.) 369; *Fox v. Cash*, 11 Penn. St. (1 Jones) 207; *Grumbles v. Grumbles*, 17 Texas, 472; *Roberts v. Berdell*, 61 Barb. (N. Y.) 37.]

<sup>2</sup> *Houseal v. Gibbs*, 1 Bail. (S. C.) Eq. 311.

it is, he proceeds to say, that if the trustee recognizes another person as the *cestui que trust*, long possession and continued enjoyment of the property under such recognition will entitle the substituted *cestui que trust* to set it up as a bar in equity.<sup>1</sup> He then cites the great case of *Lord Cholmondeley v. Lord Clinton*, as furnishing a rule for all cases arising under a like analogy.<sup>2</sup> In a case subsequently decided by the same learned judge, he gives his opinion that though the doctrine that a positive and technical trust is not barred by lapse of time is regularly true, yet the doctrine is subject to two qualifications; namely, that no circumstances exist to raise a presumption from lapse of time of an extinguishment of the trust; and that *no open denial or repudiation of the trust* is brought home to the knowledge of the parties in interest, which requires them to act as upon an asserted adverse title.<sup>3</sup>

175. In all cases in which a trustee places money in the hands of a banker, and mixes it with his own, in common account, he is deemed to have treated the whole as his own;<sup>4</sup> and, according to the foregoing authorities, he would be liable to be proceeded against

<sup>1</sup> *Robinson v. Hook*, 4 Mason (Cir. Co.), 152. [And see *Farnam v. Brooks*, *supra*; *Tinnen v. Mebane*, 10 Texas, 246.]

<sup>2</sup> *Cholmondeley v. Clinton*, 2 Jac. & Walker, Ch. 1. And see *Trecothick v. Austin*, 4 Mason (Cir. Co.), 16. If there has been a clear breach of trust, and the *cestui que trust* has for a long time acquiesced in the misconduct of the trustee, with full knowledge of it, a court of equity will not relieve. *Broadhurst v. Balgany*, 1 Younge & Coll. New R. 28 to 32. Time is no bar in cases of direct trust; but it *may be otherwise* if there has been a direct and independent dealing between the *cestui que trust*, after the relation has terminated. *Wedderburne v. Wedderburne*, 2 Keen (Rolls Court from 6 W. IV. to 1 Vict. 2 vols.), 749.

<sup>3</sup> *Baker v. Whitting*, 8 Sumn. (Cir. Co.) 466. And see *Edwards v. University*, 1 Dev. & Bat. (N. C.) 825. [And lapse of time, without any claim or admission of an existing right, coupled with circumstances tending to show that a trust has been executed, may raise a presumption of its execution; and, in the case of a guardian, may authorize the court to require a less specific statement of the items of the account, and raise a presumption of payment to and for the ward to the amount. The natural presumption is very strong where the guardian has lived a long time after the termination of the relation, without claim or acknowledgment, and the claim is made after his decease. *Gregg v. Gregg*, 15 N. H. 190; *Whedbee v. Whedbee*, 5 Jones, Eq. (N. C.) 392. A mortgagee in possession of personal property who devises it asserts an absolute title, and the statute runs from the probate of the will, which is *prima facie* evidence of notice of that assertion. *Kolheim v. Harrison*, 84 Miss. (5 George) 457. When a party is converted into a trustee on the ground of fraud, the statute will run against the claim of the *cestui que trust*. *Wheeler v. Piper*, 8 Jones, Eq. (N. C.) 249.]

<sup>4</sup> 2 Story's Eq. § 1270.

from the conversion; and might consequently plead the statute at the expiration of six years from the time of the conversion.<sup>1</sup>

176. The settlement of an executor's account in the proper court, it has been held in Pennsylvania, does not change his character as trustee, and he still holds the assets for the purposes of the will, and not adversely to it;<sup>2</sup> and yet a legatee will be barred by the statute at the end of six years, in respect of a sum of money charged to be due from the executor, which, at the time of the settlement of his account, and afterwards be *denied* to be due.<sup>3</sup> But such denial, it appears, may be presumed. In *Webster v. Webster*, a bill was brought against an executor for an account and payment of a debt due the plaintiff. He pleaded the statute, and although regarded in equity as a trustee for the payment of the debts, yet the court thought his plea a good one, because it appeared that he had been possessed of the effects of his testator more than six years, and the plaintiff might have brought his action of account within that time.<sup>4</sup>

177. Trusts *devolving* on an executor, and trust property in the hands of the deceased, kept separate, are not assets in the hands of executors and administrators; and the statute does not run against them. But if money has been invested in personal securities by the testator in trust, and kept separate from his general estate, and they come into the hands of the executor, with the express trust on their face, they are in equity, to all intents and purposes, the property of the *cestui que trust*, and subject to a suit by him for specific delivery; and if, instead of subsisting in the hands of the executor, as executor, it has become a mere money transaction, although originating in a trust, it then assumes the character of a debt, and the *cestui que trust* is a creditor subject to be barred by the statute.<sup>5</sup>

178. But there are certain trusts to which the statute of limitations directly applies. The books furnish no case in which a court of equity has ever felt at liberty to dispense with the operation of the statute against a legal demand, unless there has been some extrinsic equity to authorize it; but the cases are numerous to

<sup>1</sup> See *Buchan v. James*, 1 Speer (S. C.), Ch. 875.

<sup>2</sup> *Thompson v. M'Gaw*, 2 Watts (Penn.), 161.

<sup>3</sup> *App v. Driesbach*, 2 Rawle (Penn.), 287. And see also *Doebler v. Snavely*, 5 Watts (Penn.), 225.

<sup>4</sup> *Webster v. Webster*, 10 Ves. Ch. 98; recognized in *Ex'rs of Fisher v. Ex'rs of Tucker*, 1 M'Cord (S. C.), 176. [*State v. Blackwell*, 20 Mo. 97.]

<sup>5</sup> *Trecothick v. Austin*, 4 Mason (Cir. Co.), 16.

the contrary.<sup>1</sup> Sir William Grant, in *Beckford v. Wade*,<sup>2</sup> says, that if the statute of limitations intended to leave open every equitable question to perpetual litigation, it was ill calculated for obtaining its professed purpose, and of preventing many vexatious and expensive suits at law and in equity, of which the preamble complains. That such is not the intention is rendered clear by Chancellor Kent, in *Kane v. Bloodgood*,<sup>3</sup> in which, after reviewing the decisions on the subject from a remote period, he concludes that trusts intended by courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts to which we have already referred, and which are not cognizable at law, but fall within the proper, peculiar, and *exclusive* jurisdiction of a court of equity. In all cases of trusts, he makes it appear, that, whether or not they are affected by that statute depends upon whether or not they are cognizable at law. Those which are so cognizable are not to be withdrawn from the operation of the statute. The reciprocal rights and duties, founded upon the various species of bailment, and growing out of those relations, as between "hirer and letter to hire, borrower and lender, depositor and the person depositing, a commissioner and an employer, and receiver and a giver in pledge," are cases of direct trust; and are contracts, which, as Sir William Jones says, "are among the principal springs and wheels of civil society."<sup>4</sup> Mr. Justice Kennedy, in giving the opinion of the Supreme Court of Pennsylvania, in *Finney v. Cochran*,<sup>5</sup> recognizes the doctrine as thus laid down by Chancellor Kent, and says that to hold that the statute is not applicable to any cases which may, even with propriety, be denominated cases of trust, would, in a great measure, defeat the plain and manifest intention of the legislature. "A great proportion of the money transactions of the ordinary business of life, where no instrument under seal passes between the parties, would

<sup>1</sup> Per the Chancellor, in *Ex'rs of Fisher v. Ex'rs of Tucker*, 1 M'Cord (S. C.), Ch. 174. And the Chancellor cites, among other authorities, *Hovenden v. Lord Annesley*, (1 Scho. & Lefr. Ch. 680), in which Lord Redesdale says: "Courts of equity are bound to yield obedience to the statute of limitations upon all *legal* titles and *legal* demands."

<sup>2</sup> *Beckford v. Wade*, 17 Ves. 95.

<sup>3</sup> *Kane v. Bloodgood*, 6 Johns. (N. Y.) Ch. 110; recognized in *Farnam v. Brooks*, 9 Pick. 242.

<sup>4</sup> *Jones on Bailments*, 2.

<sup>5</sup> *Finney v. Cochran*, 1 Watts & Serg. (Penn.) 112. Cases referred to *App v. Driesbach*, 2 Rawle (Penn.), 302; *Lyon v. Marclay*, 1 Watts, lb. 275.



be excluded from its operation, and a flood of litigation arise, after a lapse of six years, which, owing to the length of time, it would be impossible in many instances to determine, according to truth and justice, between the parties." The defendant, in this case, had received money on account of the plaintiff, a portion of which was to be applied to reimburse the defendant for money paid by him in the discharge of an accommodation indorsement for the plaintiff. The surplus he was bound to have paid without delay; and, for his neglect or failure to do so, the plaintiff might have sued for the recovery of it immediately; for, in the view of the court, "it had become a debt due to the plaintiff, which the defendant was bound to pay him, *without even a demand* being made for it."<sup>1</sup> The distinction between such trusts are actionable at law, and such as are *exclusively* within the jurisdiction of a court of chancery, in respect to the application of the statute of limitations, was recognized by Mr. Justice Washington in *Wisner v. Barnet*,<sup>2</sup> where he says that the rule applicable to this subject appeared to him "to be very intelligibly and directly laid down in the case of *Kane v. Bloodgood*."<sup>3</sup> In cases of implied trusts in relation to personal property, or to the rents and profits of real estate, where persons claiming in their own right are turned into trustees by implication, the right of action in equity will be considered as barred at the end of the time limited by the statute, in analogy to the limitation of a similar action at law.<sup>4</sup> After a ward comes of age, the fiduciary relation of the guardian ceases; they stand as debtor and creditor; and the claim of the ward is within the statute.<sup>5</sup> If a judgment be as-

<sup>1</sup> [So where money is paid to a creditor, to be applied "on note," the statute does not begin to run till a refusal so to apply it. *Sawyer v. Tappan*, 14 N. H. 352.]

<sup>2</sup> *Wisner v. Barnet*, 4 Wash. (Cir. Co.) 681.

<sup>3</sup> See also *Walker v. Walker*, 16 Serg. & Rawle (Penn.), 379; *Rush v. Burr*, 1 Watts (Penn.), 120; *Doebler v. Snavely*, 5 Ib. 225; *Spotswood v. Dunbridge*, 4 Hen. & Munf. (Va.) 189; *Singleton v. Moore*, Rice (S. C.), Eq. 110; *Talbot v. Todd*, 5 Dana (Ky.), 199; *Houseal v. Gibbs*, 1 Bail. (S. C.) Eq. 402; *Cooke v. Williams*, 1 Green (N. J.), 209; *Paige v. Hughes*, 2 B. Mon. (Ky.) 488; *Stephen v. Yandle*, 3 Hayw. (N. C.) 221; *Ramsey v. Dens*, 2 Desauss. (S. C.) 238; *Overstreet v. Bate*, 1 J. J. Marsh. (Ky.) 370; *Pynson v. Ivey*, 1 Yerg. (Tenn.) 297, also 361; *Van Ryn v. Vincent's Executor*, 1 M'Cord (S. C.), Ch. 314; *Mussey v. Mussey*, 2 Hill (S. C.), Ch. 496. [*Smith v. Calloway*, 7 Blackf. (Ind.) 86. *Lexington v. Ohio Railroad Co.*, 7 B. Mon. (Ky.) 556.]

<sup>4</sup> *Hawley v. Cramer*, 4 Cow. (N. Y.) 717. [*Sheppards v. Turpin*, 3 Gratt. (Va.) 373; *Wylly v. Collins*, 9 Ga. 252.]

<sup>5</sup> *Ball v. Towson*, 4 Watts & Serg. (Penn.) 557; *Green, Executor v. Johnson*, 3 Gill & Johns. (Md.) 389. The statute runs in favor of the guardian from the final



signed as security to indemnify the assignee for the liability he is under for the assignor, and the assignee assign it to another who has a knowledge of the facts, the holder of it having collected the money, is a trustee, and upon the first assignee being relieved of his liability, the plaintiff is entitled to recover the money from the last assignee. And the right of action accrues when the liability of the first assignee ceases; and from that period the statute begins to run.<sup>1</sup> If one place money or goods in the hands of another, upon an agreement that the bailee shall keep them safely, and restore them when demanded by the bailor, though it is a direct trust to which the statute will not apply; yet, if one receive money or goods of another, believing that they belonged to him, when in fact *ex æquo et bono* they belonged to a stranger, — that is an implied trust, and the stranger is entitled to recover, and he may be barred by the statute of limitations.<sup>2</sup>

settlement. *Alston v. Alston*, 34 Ala. 15. And so too against the guardian's claim upon the estate of his ward for expenses, from the termination of the guardianship. 88 Ala. 214. And if ever an unauthorized person assumes to act as guardian, and receives money, the statute begins to run immediately, if there be no existing disability. *Johnson v. Smith*, 27 Mo. (6 Jones) 591.

<sup>1</sup> *Poe v. Foster*, 4 Watts & Serg. (Penn.) 851.

<sup>2</sup> *Buchan v. James*, 1 Speer (S. C.), Eq. 875. [Where one buys property with the money of another, the trust thereby raised is an implied one in favor of the owner of the money, and is subject to the statute of limitations. *Murdock v. Hughes*, 7 S. & M. (Miss.) 219. And the statute runs against a claim for an account for the rents and profits of land by one tenant in common against his co-tenant in possession. *Wagstaff v. Smith*, 4 Ired. (N. C.) Eq. 1. See also *McDonald v. Sims*, 8 Kelly (Ga.), 888; *White v. White*, 1 Md. Ch. Decis. 58; and *post*, § 181. And against one partner who seeks an account from his co-partner. *Taylor v. Adams*, 14 Ark. 62. But in Georgia it has been held otherwise, at least so long as there are outstanding debts due to or from the copartnership. *Hammond v. Hammond*, 20 Ga. 556. A settlement of the account of the treasurer of a school district, certified by the proper officer, cannot be opened after six years. *Porter v. School Directors, &c.*, 18 Penn. St. 144. Where a trustee would be barred, so also would his *cestui que trust*. *Sheppards v. Turpin*, 8 Gratt. (Va.) 878, *ubi sup.*; *Herndon v. Pratt*, 6 Jones, Eq. (N. C.) 327.]

## CHAPTER XVII.

## AGENCY AND FACTORAGE.

179. A VERY common, and no less important, fiduciary relation in mercantile law is that of principal and agent, and consignor and consignee. If goods are consigned to a factor for sale, the law raises a contract to account for such as are sold; and according to the opinion of Lord Mansfield and the rest of the court, in *Topham v. Braddick*,<sup>1</sup> no action for not accounting lies till after *demand* made, and of course, if that be so, the statute does not begin to run in favor of the consignee till that time. It has been shown, that if a promissory note is payable on demand, a previous demand is not necessary;<sup>2</sup> but Lord Mansfield, in the case referred to, said, "the plaintiff was to do a collateral thing," and, therefore, upon the authority of *Collins v. Benning*,<sup>3</sup> no debt was created till demand.<sup>4</sup> The rule is thus stated by a learned judge of one of our State courts: If A place merchandise in the hands of B, to be sold for the use of A, and B, not selling, retain possession for seven years, when A demanding a return, and being refused, brings trover or replevin for the goods, the plea of the statute would be no bar to a recovery; because *until the demand*, he had no cause of action, and therefore the case is not within the letter of the statute. But if the demand and refusal had been within one year after the delivery, then the plea of limitation would be a bar; a cause of action existing from the time of the demand is clearly within the express terms of the statute.<sup>5</sup> But the rule, as above

<sup>1</sup> *Topham v. Braddick*, 1 Taunt. 571. [*Hyman v. Gray*, 4 Jones (N. C.), Laws, 155.]

<sup>2</sup> *Ante*, § 95.

<sup>3</sup> *Collins v. Benning*, 12 Mod. 444.

<sup>4</sup> Heath, J., said, "A demand must be either proved or *presumed*." Lawrence, J., said he remembered an action of trover between Lord Bute and Mr. Wortley Montague, for furniture left for many years in a mansion-house: the statute of limitations was set up; but the demand and refusal were of recent date, and the plaintiff recovered.

<sup>5</sup> Per Dorsey, J., in giving opinion of the court, in *Green v. Johnson*, 3 Gill & Johns. (Md.) 389. [Where money was placed in the hands of an agent to purchase slaves, and he neglected to do so, it was held, in an action for the money, that the statute did not begin to run until a demand for the money by the principal. *Buchanan v. Parker*, 5 Ired. (N. C.) 507. But see *post*, § 182, note.]

laid down, is clearly subject to qualification, as a notification by a bank to a depositor, that his claim will not be paid on demand at the counter, dispenses with the necessity of a demand, as preliminary to the right to sue.<sup>1</sup> So, where there is a joint purchase of goods, and one of the purchasers is to account to the other for a share of them, or of the net proceeds, the right of action is perfect as soon as an account of sales is rendered.<sup>2</sup>

180. As Mr. Chief Justice Parker, in giving the opinion of the Supreme Court of Massachusetts, in *Clark v. Moody*,<sup>3</sup> deemed this subject of sufficient importance to demand a considerate exposition of the law, it here follows: "We must understand that the merchandise was sent on to be sold, without any special instructions from the plaintiff, as to the disposition of the proceeds, and must gather the understanding and intention of the parties, as well as we can, from their acts and doings, relative to the subject-matter of the contract between them.

"The general rule laid down in the books is, that when goods are delivered to a factor, to be sold and disposed of for his principal, the law implies a promise on the part of the factor that he will render an account of them, whenever called upon by the principal; and if he refuses to account, he is liable to an action of *assumpsit* for the breach of his implied promise. It seems to have been formerly doubted, whether any action but account would lie against a factor; and afterwards it was thought that an express promise to account was necessary to maintain *assumpsit*. But the doctrine now settled is, that the undertaking to act as bailiff is an undertaking to account; and Lord Holt, in the case of *Wilkin v. Wilkin*, 1 Salk. 9, referred to by the plaintiff's counsel, says, wherever one acts as bailiff, he promises to render an account. Although in *Comyns on Contracts*, 261, the inference from this case is made to be, that the factor is liable only on demand, or on refusal to pay money, yet if the general principle adopted by Holt is right, that the mere acting as bailiff is promising to account, it would not seem that a demand was, in all cases, necessary to enable the principal to maintain his action. Indeed, such a limitation of the liability of a factor would be exceedingly inconvenient and tend to the embarrassment of trade. For, if a merchant, who sends his

<sup>1</sup> *Farmers' and Mechanics' Bank v. Planters' Bank*, 10 Gill & Johns. (Md.) 422.

<sup>2</sup> *Murray v. Coster*, 20 Johns. (N. Y.) 576.

<sup>3</sup> *Clark v. Moody*, 17 Mass. 145.

goods to a foreign country to be sold, can have no right to call for his money, the proceeds of his goods, until he has sent abroad to make a demand, the risk of loss from the failure of factors would be considerably increased, and the disposition to trust them proportionably impaired.

“ Generally the consignor of goods accompanies his consignment with directions how to apply the proceeds ; either to pay them over to a third person ; or to remit in bills, or in merchandise, or in specie ; or to hold them to answer his future orders : and in these cases there can be no difficulty. For the factor cannot be liable until he has actually or impliedly broken his orders. I say impliedly, for if the factor should become bankrupt or insolvent, with the goods of the principal or their proceeds in his hands, so that he is disabled from remitting them, or otherwise appropriating them according to the instructions of the principal, there seems to be no reason why an action would not immediately lie against him ; by analogy to the common-law principle, that when a duty is to arise upon a demand, and the party liable has disabled himself from performing, the necessity of a demand ceases. And if this were not so, creditors here, who could not for a long time cause a demand to be made, would have no opportunity of securing themselves out of the effects of the factor in this country ; while creditors of a different description, but not more meritorious, would meet with no impediment in securing their debts.

“ The practice here has conformed to this principle ; for many instances are known to have occurred, of actions brought and sustained against factors in foreign countries, although no demand had been previously made upon them to render an account. And it is probably upon this ground, if at all, that a principal may prove his claim against his factor, under a commission of bankruptcy in England, although no demand had been made upon him ; so that the debt was contingent according to the general liability of factors. 3 D. & E. 249.

“ It is also the duty of factors to account to their principals in a reasonable time, without any demand, in cases where a demand would be impracticable or highly inconvenient, so that a factor abroad, who should receive goods to sell, without special directions as to the mode of remittance, would be held, according to the course of business, to give his principal information of his progress in the transaction ; and if he should neglect unreasonably to for-

ward his account to his employer, this negligence would be a breach of his contract, and subject him to an action.

“ So, if he should render an untrue account, even without any intention of fraud, claiming greater credit than he was entitled to, so that the balance shown was not true, we conceive the principal would have a right of action, without a demand. For he would not be obliged to submit to such charges as the factor should choose to make, or to wait, perhaps at the risk of his debt, until his agent should voluntarily correct his account, and acknowledge a just balance.

“ But if the factor should receive and sell the goods, without any special orders as to remittance, upon an understanding, express or implied, that he is to hold the proceeds to the order of his principal; and he does nothing in violation of those orders, or to disable himself from complying with them when they shall be received; and transmits a true account of sales, in a reasonable time, according to the course of business, and is ready to remit or answer drafts upon him, — we think that no action will lie against him for the balance in his hands. For his contract is to sell and render an account, and he ought not to be held to remit at his own risk; and he cannot remit at the risk of his principal, unless in compliance with instructions.

“ It was urged in argument, that, as the defendants had stated an account and acknowledged a balance, they were indebted for that balance, and that a right of action immediately accrued without demand, as in other cases of admitted debt.

“ It may be so, where there is nothing in the case to control the legal presumption. But if the course of business between the parties, or any evidence accompanying the account, shows a contrary implication, the presumption would fail.

“ In the case before us, the referees state, that, when the account was sent on, which acknowledges the balance, it was accompanied by a letter from the defendants, in which they state that they hold the balance for the order of the plaintiff. This declaration is repeated in the following month; and it appears by the account stated by the referees, that all the proceeds, except the balance acknowledged, had been paid by drafts from the plaintiff. These facts, with nothing of a contrary complexion, go far to show that the consignments were accepted with an understanding that the proceeds were not to be remitted without orders from the consignor.

“The case in this view seems to be at least as strong as that cited from 10 Johns. 285, in which it was decided that the consignee was not liable in the action, because he had committed no breach of trust or duty. It appeared in that case to be the usage for the consignor to direct the mode of remittance; and it probably is the general practice everywhere. Such practice, together with the conduct of the defendants in the case before us, may justify the conclusion that this consignment was made and accepted conformably to this practice.

“But this is a fact to be stated by the referees, and not by the court. If they determine, from the evidence in the case, that the understanding of the parties was, that the consignor was to direct the remittance, to draw for the proceeds, or otherwise appropriate them, then the defendants were not liable to the suit; and of course not to the costs, unless they were negligent in transmitting their account, or upon another ground they rendered themselves liable.

“It has been stated, as one of the grounds of the liability of a factor, that he should have transmitted a false account, or one misrepresenting the balance in his hands. In the account transmitted by the defendants, the balance stated is little more than half the amount found by the referees to be due. *Prima facie*, this shows a wrong statement of account, by which the plaintiff was not bound to abide. If he had drawn for a larger sum, his bill might have been protested; if he had drawn for the balance as stated, it might have been an admission that the balance was true. He had, therefore, a right to sue, if it should turn out that there was a misstatement of the account. On the other hand, if it shall appear that the account was correct, and that the referees have increased the balance against the defendants improperly, or from considerations of supposed equity, contrary to their legal rights, the eventual balance found would not affect their liability when the suit was brought.

“A large debt of one Lethbridge was lost in consequence of his failure. The referees determined that the loss should fall upon the plaintiff, the defendants having been guilty of no negligence. But they had charged commissions on the amount of the sales to Lethbridge, which the referees disallowed. Was it right for the defendants to charge commissions on this sale, the fruits of which were lost? This must depend upon the usage among merchants.

If such commissions are not usually charged, it was improper for the defendants to charge them, and the balance represented by them was not the true balance. If, on the other hand, it is considered proper among merchants, and is usual to charge a commission in such cases, the account is right in that particular.

“It appears, also, that another sum, debited to the defendants, was not credited in the account rendered by them. If an account of this was rendered before the suit was commenced, and in a reasonable time after the money was received, the defendants are in no fault on account of this sum. But at present it appears that the sum remained in their hands unacknowledged, when the suit was commenced. This matter may also admit of explanation.

“As, then, the question of costs is seen to depend upon facts which are not ascertained by the report of the referees, we conclude to recommit the report to them, with directions to consider and determine: 1. Whether, from the correspondence between the parties, the course of business between them, or from any other evidence in the case, it appears that the consignments were made and received, under an expectation or understanding that the plaintiff was to draw for the proceeds, or otherwise to direct the remittance. 2. Whether the account rendered of the sales, and of the balance, were true, according to the defendants' rights as factors, agreeably to the usage of commission merchants. 3. Whether the defendants, within a reasonable time after the receipt of the proceeds, rendered an account thereof to the plaintiff. And if they find all these points in the affirmative, they will not charge the defendants with costs; otherwise they will.”<sup>1</sup>

181. Thus it appears, that much depends upon whether the agent or consignee retains the funds of the principal, claiming them either actually or constructively as his own, and with the actual or constructive knowledge and acquiescence of the principal. In other words, whether there has been a *conversion*, open and actual, or one to be presumed by the rules of law, under the circumstances of the case.<sup>2</sup> The statute, it appears, will run in favor of a master in equity against an account for the proceeds of property sold by him in his official character, without any demand, if there

<sup>1</sup> [If the consignee return an account, the statute begins to run from the time when the account is received by his principal. *Davies v. Crum*, 4 Sandf. (N. Y.) Sup. Ct. 590.]

<sup>2</sup> See *Kinney's Ex'rs v. M'Clure*, 1 Rand. (Va.) 284.



be notice of an adverse claim.<sup>1</sup> It was held in one case, that the statute will not run between principal and agent after an accounting between them; but it was on the ground that the accounting could not be presumed to be a demand for moneys collected by the agent previously, because they were *kept out of view* at the time of accounting.<sup>2</sup> In *Taylor v. Bates*, in the Supreme Court of the State of New York,<sup>3</sup> it was held that an attorney was not liable to a suit for money collected for another, till demand made, or directions to remit; or that he was not in default till he received orders from his principal. It did not appear, said the court, by Woodworth, J., that the plaintiff ever demanded payment, or requested the money to be remitted; or that any laches were shown on the part of the defendant, or unwillingness to pay. To support an action grounded upon the liability of the defendant, before he had refused to pay or remit, according to instructions, would be in opposition to the nature of the trust the defendant had assumed, as well as against justice and good faith. This case is analogous to that of *Ferris v. Paris*,<sup>4</sup> in the same court, where it was held that a factor or consignee, apprising his principal of the sale of goods consigned to him, may wait to receive instructions as to the mode of remitting the net proceeds; and is not liable to an action until a default on his part in remitting or paying the proceeds, according to the order of his principal. In the subsequent case of *Stafford v. Richardson*,<sup>5</sup> in the same court, it was held that an action against an attorney for money collected by him must be brought within six years after the money is received by him, or the plaintiff will be barred by the statute; and that the fact that a demand was *not* made within six years before suit brought will not save the statute. The court distinguish this case from that of *Ferris v. Paris*, the decision in which, they say, is correct. The defendant, in that case, had informed his principal of the receipt of the money, and waited for directions to remit, and it was

<sup>1</sup> *Houseal v. Gibbs*, 1 Bail. (S. C.) Eq. 482.

<sup>2</sup> *Wardlaw v. Gray*, Dudl. (Ga.) Eq. 85.

<sup>3</sup> *Taylor v. Bates*, 6 Cowen (N. Y.), 376. [*Hyman v. Gray*, 4 Jones (N. C.), Law, 155; *Sneed v. Hanly*, 1 Hemp. 659; *Merle v. Andrews*, 4 Tex. 200; *Downey v. Garrard*, 24 Penn. St. 52.]

<sup>4</sup> *Ferris v. Paris*, 10 Johns. 285. [*Baird v. Walker*, 12 Barb. (N. Y.) 298. If the factor delay unreasonably to inform his principal and to remit, this is a fraudulent concealment, and the statute does not run in his favor. *Kane v. Cook*, 8 Cal. 449.]

<sup>5</sup> *Stafford v. Richardson*, 15 Wend. (N. Y.) 802.

expressly said, that no laches were shown on the part of the defendant. Although, the court said, an attorney may protect himself from a suit by want of a demand, he is not, for that reason, to be subject all his lifetime to demands, however stale. That if a demand was necessary in this case, the *plaintiff should have made it in season to have brought his suit within six years* after the defendant had converted the property received by him to his own use.<sup>1</sup> This view of the subject, it will be perceived, corresponds with the view taken of the subject by Mr. Justice Parker, in the above case of *Clark v. Moody*, in which he says that it appeared in the case of *Ferris v. Paris*, to be the usage for the consignor to direct the mode of remittance; and in which he considers it important, whether a consignee, within a reasonable time after receipt of proceeds, renders an account thereof to his principal.<sup>2</sup>

<sup>1</sup> [*Campbell v. Beggs*, 48 Penn. St. 524. If the attorney give no notice within a reasonable time that he has collected the money, the statute of limitations will begin to run against the client's claim from the time when his attorney should have apprised him that he had collected funds. *Denton v. Embury*, 5 Eng. (Ark.) 228; *McDonnell v. Bank of Montgomery*, 20 Ala. 818. Or from the time when the client knew, or ought to have known, that the money was collected; and the burden of proof is on the attorney to show that his client ought to have known. *McCoon v. Galbraith*, 29 Penn. St. 298; *McDowell v. Potter*, 8 Barr (Pa.), 189. But where the duty is immediate, as on the collection of money to pay it over, the statute begins to run from the collection, the law looking upon the client's failure to make inquiry for six years, as laches, unless he has been deceived, overruling *McDowell v. Potter*, 8 Barr (Pa.), 189; *Rhines v. Evans*, 66 Pa. St. 192. Where the duty is not immediate and some time must elapse before negligence can be affirmed, the statute runs from and after the lapse of a reasonable time; and this time is for the jury to determine. *Ibid.*] If the client applies to his attorney and receives a false or evasive answer as to moneys collected, the statute will not run against the client's claims. *Gleason v. Cuttle*, 2 Grant (Pa.), 278. If the attorney gives notice, the statute will begin to run after the lapse of a reasonable time within which to demand the money collected, although no demand be made. *Lyle v. Murray*, 4 Sandf. (N. Y.) Sup. Ct. 855; *Hickok v. Hickok*, 13 Barb. (N. Y.) 632. And see *Taylor v. Spears*, 8 Eng. (Ark.) 429; and § 178, *ante*. But if the defendant, by his own act, prevent a demand, he shall not be allowed to object that it was not made in reasonable time. *Emmons v. Hayward*, 6 Cush. (Mass.) 501. Though if he merely produces delay by negotiation he may. *East India Co. v. Paul*, 1 Eng. Law & Eq. 44.

<sup>2</sup> [In cases of general agency, where there is a current account, the statute of limitations does not attach until the expiration of the agency; but in cases of special agency, where the transactions are isolated, the statute attaches to each item of the account. *Hopkins v. Hopkins*, 4 Strobb. (S. C.) Eq. 207. And in South Carolina, the statute will run in favor of a private agent to collect and pay over money, from the time he collects it. *Estes v. Stokes*, 2 Rich. (S. C.) 320. In 1882, A employed B and C, then in partnership as attorneys, to lay out \$500 on mortgage. It was invested on a mortgage to D, who subsequently sold the land subject to the mortgage. The purcha-

182. Where one of a copartnership was constituted an agent by the others on the dissolution, to collect the debts of the firm, a demand was held necessary under the following circumstances: by articles of copartnership, the acting partner was to collect whatever debts might be due at the termination of the partnership, and account for the same as he received them, or as often as the other partners should require. The partnership was dissolved on the 4th of August, 1774, except as to such matters as necessarily related to the settlement of their accounts, the collection of their debts, and closing of their affairs. The books, &c., were left with the acting partner, who in April, 1777, made a payment in part to the other partners, who, being British subjects, were shortly afterwards obliged to leave the State. In 1800, a bill was filed against the executors of the acting partner, and the defendants pleaded the statute of limitations. But the plea was overruled. Taylor, C. J., delivering the opinion of the court, said: "The statement furnished by Kennon [the acting partner] was to show the progress from time to time he was making; the moneys were received by him in the character of a trustee, liable to pay what he received when his copartners should require it; and it was only when they did require it and he refused it, that the fiduciary character was put an end to."<sup>1</sup>

ser soon after paid the \$500 to C, who, however, informed neither his partner nor A, of such receipt; but again lent the money and continued to receive the interest. In 1838, the partnership was dissolved. A knew nothing of any of these transactions till 1848, nor did his representatives, and B was also ignorant of all the facts subsequent to the original advance of the money. It was held, in an action by the executors of A against B and C, that the statute of limitations was a bar. *Sims v. Brutton*, 1 Eng. Law and Eq. 446. And where a sheriff collects for several creditors upon successive attachments against a single debtor, the fund will be regarded as entire, and the statute does not run against each creditor from the time when his claim was collected, but begins to run when the whole is collected. *Davy v. Field*, 1 Abb. (N. Y.) App. Dec. 490.]

<sup>1</sup> *McNair v. Kennon's Ex'rs*, 8 Murph. (N. C.) 139. Where a bank receives money on deposit in the ordinary way from one of its customers, the latter cannot maintain an action for it without a previous demand either by check or otherwise; and the rule is the same, though the action be for a balance struck on the customer's bank-book, by one of the clerks in the bank. (Cowen, J., dissenting.) *Downes v. Phoenix Bank, &c.*, 6 Hill (N. Y.), 297. [But in *Pott v. Cleg*, 16 Mees. & Welsb. 821, s. c. 12 Jur. 287, it was held (Pollock, C. B., *dubitante*), that money so deposited was money lent, and could not be recovered back after the lapse of six years from the time of deposit. See also *Berry v. Pierson*, 1 Gill (Md.), 284. And where A received money to be invested in the payment of government fees for Texas scrip, placed in his hands for location, held that he was bound to do it within a reasonable time, and after the lapse of that time the statute began to run. *Mitchell v. McLemon*, 4 Tex. 151. But see *ante*, §§ 115 and 179, note.]

## CHAPTER XVIII.

## REPLICATION OF FRAUD.

183. It is a question of consequence whether the fact of fraud committed under circumstances which keep concealed a knowledge of the fact, and thus delay the assertion of a right beyond the time limited by the statute, may be replied as a bar to a plea of the statute in a *court of law*; provided an action is brought within six years from the time of the discovery of the fraud, or after the opportunity afforded of making the discovery. In regard to this subject, some of the cases make a marked and manifest distinction between a plea of the statute in a court of law and a *court of equity*.<sup>1</sup> The reason offered by Lord Redesdale, why, if fraud has been concealed by one party, until it has been discovered by the other, and the statute shall not operate as a bar, is this: *that the statute ought not in conscience to run; the conscience of the party being so affected, that he ought not to be allowed to avail himself of the length of time*.<sup>2</sup> Such is, without controversy, the settled doctrine of courts of equity.<sup>3</sup>

<sup>1</sup> [*Post*, § 185.]

<sup>2</sup> *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 684.

<sup>3</sup> See *Coster v. Murray*, 5 Johns. (N. Y.) Ch. 522, and Story's Eq. Jur.; *Lewin on Trusts and Trustees*, 617. [*Michaud v. Girod*, 4 How. (U. S.) 508; *Hallett v. Collins*, 10 Ib. 174; *Phalen v. Clark*, 19 Conn. 421; *ante*, § 80. But the fraud is not actual, but merely constructive, the statute applies. *Wilmerding v. Russ*, 83 Conn. 68. And a court of equity will not open accounts and sustain claims on account of fraud which are barred by the statute of limitations, without exercising great caution. *Stearns v. Page*, 7 How. (U. S.) 819; *Couch v. Couch*, 9 B. Mon. (Ky.) 160; *Wagner v. Baird*, 7 How. (U. S.) 234. And where a bill will lie for fraud after the remedy at law is barred, it must appear affirmatively that the bill was filed within the statute period of limitation after the discovery of the fraud. *Field v. Wilson*, 6 B. Mon. (Ky.) 479. In *Ferris v. Henderson* a claim for services forty years old was sustained against a master, who had obtained them by falsely representing to the person who rendered them that he was a slave. 12 Penn. St. (2 Jones) 49. To avoid the bar of the statute the plaintiff must not only allege his ignorance of the fraud, but when and how he discovered it, and must offer satisfactory evidence to prove these averments. *Carr v. Hilton*, 1 Curtis (U. S.), 390. That the statute begins to run from the discovery of the fraud, see *Stocks v. Van Leonard*, 8 Ga. 511; *Lawrence v. Trustees, &c.*, 2 Denio (N. Y.), 577; *Donnelly v. Donnelly*, 8 B. Mon. (Ky.) 118; *Long-*

184. In support of the above doctrine in a court of law, the case of *Bree v. Holbreck*<sup>1</sup> has been relied on. In this case, the replication, after setting forth the means by which the plaintiff had been defrauded, went on to state, that the plaintiff, at the time of the assignment, and of paying the money, was ignorant of the falsehood of the assertions, and of the fraud so practised upon him, and did not discover them until within the space of six years next before suing out the writ. Lord Mansfield was of opinion, that the replication had charged no fraud on the defendant, but said, "*there may be cases which fraud will take out of the statute of limitations.*" This assertion of Lord Mansfield, it is true, was considered by Mr. Justice Spencer, in an important case in the State of New York,<sup>2</sup> as the only instance in which such a position was ever advanced in Westminster Hall, and he thought that, as his lordship had an inclination to intrench on courts of equity, that mere *dictum* could not be regarded as authority. But Mr. Justice Story, in *Sherward v. Sutton*,<sup>3</sup> considered that the above language of Lord Mansfield was not a mere *dictum*: Lord Mansfield must be understood to have spoken in the name of the court; and the leave granted to the plaintiff to amend, and reply fraud in the defendant, proved that the court entertained no doubt upon the principal point. In maintaining that fraud will take a case out of the statute in England, at law, the learned judge cited *Short v. McCarthy*,<sup>4</sup> in which the case of *Bree v. Holbreck* was cited by counsel on both sides, without objection; and it was not in the slightest degree impugned by the court. Though the writer has not been able to meet with any direct decision in England upon this important question, it would seem, from the above indirect authorities in that country, in connection with others, that where there is concealed fraud on the part of the defendant, the plaintiff will not

worth *v. Hunt*, 11 Ohio (N. S.), 194; *Ormsby v. Longworth*, Ib. 658; *Walker v. Walker*, 25 Ga. 76; *Smith v. Talbot*, 18 Texas, 774; *Way v. Cutting*, 20 N. H. 187; *Lott v. Degraffenreid*, 10 Rich. Eq. (S. C.) 346; *Hunter v. Hunter*, 50 Mo. 445; unless there is negligence on the part of the person who replies it. In Mississippi it is held that the statute runs from the commission of the fraud, unless there is such a relation of trust and confidence as to render it the duty of the defendant to disclose, in which case it runs only from the discovery. *Wilson v. Ivy*, 32 Miss. (3 George) 238; *post*, §§ 187, 188, and 191.]

<sup>1</sup> *Bree v. Holbreck*, Doug. 654.

<sup>2</sup> *Troup v. Smith*, 20 Johns. (N. Y.) 88.

<sup>3</sup> *Sherwood v. Sutton*, 5 Mason (Cir. Co.), 149.

<sup>4</sup> *Short v. M'Carthy*, 8 Barn. & Ald. 436.

lose his remedy.<sup>1</sup> In *Brown v. Howard*,<sup>2</sup> the plaintiff employed defendant, in 1808, to lay out money for him in the purchase of an annuity, and discovered in February, 1814, that the security provided by the defendant was void, within the defendant's own knowledge, at the time of the purchase. In January, 1820, plaintiff sued in assumpsit for breach of an implied contract to provide good security. It was held, that, the action proceeding on the contract and not on the fraud, the statute of limitations was a good bar. In this case, Dallas, Ch. J., said: "The plaintiff will not be without remedy, because he will only be nonsuited here, and may, if he deems it to his advantage, bring another action, the ground of which may be fraud; though on the propriety of such a step we give no opinion: but in *Bree v. Holbreck*, it is laid down, that, in cases of fraud, the limitation only runs from the time when the fraud is discovered." In *Clark v. Hougham*,<sup>3</sup> decided in the King's Bench, in 1823, Bailey, J., says: "It is not necessary in this case to consider whether the mere existence of fraud in the transaction has the effect of barring the statute of limitations, because that question is not raised by the pleadings. In order to take advantage of the alleged fraud, there should have been a special replication." By Holroyd, J.: "It is quite unnecessary, under the circumstances of this case, to determine whether the existence of fraud bars the statute, and indeed it would be impossible to decide that question upon these pleadings." By Best, J.: "The question of fraud has been decided by the jury, who, acting upon evidence before them, found their verdict for the plaintiff. By that finding we are concluded. I agree that we are not called upon to decide in this case, whether fraud, *per se*, is in answer to the statute of limitations, but I think if there had been a special replication of the fraud put upon this record, the defendant's second plea would have been answered, and that we might so have held without disturbing any of the former decisions upon that subject. In all those cases the fraud was complete, and the cause of action arose six years before action brought; but here the fraud is continued to a period far within six years. The rule of construction applicable to this statute in courts of law and in courts

<sup>1</sup> See Browne on Actions at Law, 67.

<sup>2</sup> *Brown v. Howard*, 8 B. & Bing. 78.

<sup>3</sup> See Bolton, *ex parte*, 1 Mont. & Ayr. (Bankruptcy) 60; *Clark v. Hougham*, 8 Dowl. & Ry. 830.



of equity is widely different; and we must abide by our own rule of construction, and, wherever we find an *acknowledgment* that the debt is unpaid, must consider the statute as defeated."

185. In this country the cases are conflicting. The Supreme Court of the State of New York have positively refused assent to the doctrine, that fraud may be replied to a plea of the statute of limitations in a court of law. In *Troupe v. Smith*,<sup>1</sup> Chief Justice Spencer, while he admitted the doctrine to be sound in a court of equity, denied its being so in a court of law. In this case, the defendant demurred generally to the plaintiff's replication. The declaration was in assumpsit on the promises of a testator as a *surveyor*, for a reward to be paid to him by the plaintiff, to survey out into lots, skilfully and accurately, a township of land, &c. The breach alleged was, that, although the testator was paid therefor a large sum of money, yet he negligently and *fraudulently* performed his undertaking, and did not faithfully nor accurately execute his work. In the replication were set forth the particulars of the fraud in making the survey. In support of his opinion the learned judge reasoned, that the statute relates to specified actions, and declares, that such actions shall be commenced and sued within six years next after the cause of such actions accrue, and not after; thus, not only affirmatively declaring within that time these actions are to be brought, but inhibiting after that period. He knew, he said, of no dispensing power which courts of law possess, arising from any cause whatever, and it seemed to him, that where the legislature, in the same statute, gives an extension of time in case of reversal of judgment, in cases of infancy, coverture of the *feme*, &c., that it would be an assumption of legislative authority to introduce any other proviso. The plaintiff's case might be a very hard one, but that afforded no reason for construing away a statute of great public benefit, and which, in many cases, is a shield against antiquated and stale demands.<sup>2</sup> The same construction of the statute has been subse-

<sup>1</sup> *Troupe v. Smith*, 20 Johns. (N. Y.) 83.

<sup>2</sup> The following comments of Mr. Justice Story, upon the opinion as delivered by Mr. Chief Justice Spencer, are worthy of being here inserted. "If the point were entirely new, and left untouched, both at law and in equity, the reasoning of the learned judge would justify much hesitation in introducing such an exception. Perhaps it would be conclusive against any attempt to go beyond the precise terms of the savings of the statute, as a limitation of duty most fit for those who are to construe the statute, and not to create an exception beyond its terms. But it is to be



quently confirmed by the same court, in *Leonard v. Pitney*,<sup>1</sup> and in *Allen v. Mille*.<sup>2</sup> In Virginia, also, the remedy in cases of fraud, after six years, is confined to courts of equity.<sup>3</sup> In South Carolina, where the maker of a note secretly and fraudulently obtained possession of the note, and kept it until the statute had run out; and the plaintiff, on discovering the fraud, brought assumpsit as on a note lost, to recover the amount, — it was held that the statute was a bar to the action, notwithstanding the fraud, and although the plaintiff had not known where the note was.<sup>4</sup> In North Carolina, Henderson, J., in delivering the opinion of the court, said, an exception as to fraud was not within the act of limitations, and a court of law was not at liberty to admit it, though a court of equity might. He admitted, however, that there had been in that State a few *nisi prius* cases to the contrary, but maintained, that

remembered that most, if not all, the statutes of limitations existing in the several States of this Union have borrowed the language of the statute of 21 of James. In all the revisions since the American Revolution, the same general enactments have been preserved; and it cannot be doubted that the expositions of the statute, which had been adopted in England, both at law and in equity, were well known to those who framed our own. Under such circumstances it would not be unnatural to suppose that these expositions were received as the true interpretation of the text. It does not strike me, therefore, that the expositions of the statute by courts of chancery are to be rejected in such cases, unless they turn, not upon the words of the statute, but upon some equity peculiar to such courts, and not cognizable at law. For if such courts profess to expound the statute upon a general principle, which must equally apply to courts of law; and *à fortiori*, if they profess to follow the law (as they certainly do in cases of *concurrent* jurisdiction), then, as has been already remarked, their decisions may justly be deemed authorities for the guidance of courts of law. With great deference, it appears to me that the learned judge has not adverted to or given sufficient weight to this consideration; and I cannot but think that if his own luminous judgment in the subsequent case of *Murray v. Coster* (20 Johns. 576), in which the distinction is so clearly drawn, had been then before him, he would not have been disposed to have pressed the argument against this class of chancery decisions quite so far. At all events, my own judgment does not justify me, in a case of concurrent jurisdiction, in rejecting their just influence as authoritative expositions of the statute, *valere quantum valere possent*." Mason, *ut supra*.

<sup>1</sup> *Leonard v. Pitney*, 5 Wend. (N. Y.) 80.

<sup>2</sup> *Allen v. Mille*, 17 Ib. 202.

<sup>3</sup> *Callis v. Waddy*, 2 Munf. (Va.) 511; *Rice v. White*, 4 Leigh (Va.), 474.

<sup>4</sup> *Miles v. Barry*, 1 Hill (S. C.), 296, cited 2 Rice's Dig. 83. [Where apparently fraudulent conduct had been practised at a sheriff's sale, in 1842, whereby competition was checked, and, in 1848, a suit was brought to set aside the sale on that ground, it was held that the action was barred by the statute of limitations. *Thrower v. Cureton*, 4 Strobb. (S. C.) Eq. 155. And the statute begins to run from the purchase, and not from the date of the deed. *Cox v. Cox*, 6 Rich. Eq. (S. C.) 275. That a deed of land was obtained by fraud is no answer to a plea of the statute of limitations. *York v. Bright*, 4 Humph. (Tenn.) 312.]

when the words of an act and its savings are explicit, courts were not able "to travel out of them."<sup>1</sup>

186. There is very great weight of authority, however, in this country the other way, and the doctrine is maintained by a number of the most respectable authorities, that where there is fraud, the statute does not operate in courts of law, until the party affected is conscious of it. Many years since a question arose in the Supreme Court of Massachusetts, on a replication of fraud, which showed the impracticability, if not the impossibility, of discovering the fraud. The replication stated, that the defendant fraudulently and deceitfully concealed the bad foundation of a road he had engaged to make, the unsuitable materials, and the work unfaithfully executed, by covering the same with earth, and smoothing the surface, so that it appeared to the plaintiffs, that the contract had been faithfully executed. Parsons, Ch. J., held that the replication must disclose a fraudulent transaction in the defendants, by which the time when the cause of action accrued must have been fraudulently concealed from the knowledge of the plaintiff, until a period within six years before the action was commenced. And that, where the delay in bringing the suit is owing to the fraud of the defendant, the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain a knowledge that he had a cause of action ; and that if this knowledge is concealed from him by the defendant fraudulently, the court would violate a sacred rule of law, if they permitted the defendant to avail himself of his own fraud.<sup>2</sup> The cases referred

<sup>1</sup> *Executor of Hamilton v. Smith*, 8 Murph. (N. C.) 115. In 1788, however, Johnston, J., said, in *Sweat v. Arrington*, 2 Hay. (N. C.) 129 : "Supposing it to be a fraud, which there is no evidence of, then the act will not run but from the time of its discovery." This is not referred to in the first-mentioned case, by Henderson, J.

<sup>2</sup> *Massachusetts Turnpike Company v. Field*, 8 Mass. 201. [*Livermore v. Johnson*, 27 Miss. (6 Cush.) 284. The defendant worked mines more than six years before action brought, at some distance from plaintiff's house, in such a manner that within six years the effect reached and undermined the plaintiff's house. No actual damage was done, nor was the act of the defendant known to the plaintiff till within six years. Held, in the Exchequer Chamber, that the plaintiff could recover, reversing the judgment of the Queen's Bench. 1 Ellis, B. & E. 622; *Backhouse v. Bonomi*, 1 Ellis, B. & S. 970. Affirmed in H. of L. 7 Jur. (N. S.) 809. If the cause of action be a single act, as, for instance, a trespass, — not a continuing trespass, — the statute runs from the act done ; but if the cause of action be not the doing of the act, but the resulting damage, then the statute runs from the happening of the damage. *Whitehouse v. Fellows*, 9 C. B. (N. S.) 901 ; s. c. 10 C. B. (N. S.) 765. This was a case of negligent construction of a road, whereby subsequently the plaintiff was injured by the overflow

to as authority by the learned judge are *Bree v. Holbreck*, and the case in equity of the *South Sea Company v. Wymonsdell*.<sup>1</sup> The same construction of the statute prevails in Maine, and in *Cole v. McGlathry*,<sup>2</sup> *Weston, J.*, who gave the opinion of the court, said that the cases of *Bree v. Holbreck*, and *Massachusetts Turnpike Company v. Field*, established and qualified the exception in question.<sup>3</sup> Fraud not discovered until after six years may also be successfully replied to a plea of the statute in Pennsylvania,<sup>4</sup> and the court, in *Harrisburg Bank v. Foster*,<sup>5</sup> cite as authority the case of the *Massachusetts Turnpike Company*. In Indiana, the construction is, that the statute begins from the time only that the fraud is fully developed and disclosed, so as to enable the injured party to perceive the nature and extent of the fraud committed.<sup>6</sup> It was likewise so held by Mr. Justice McLean of the Supreme Court of the United States, in the court for the seventh circuit in that State.<sup>7</sup> Mr. Justice Story, of the same high court, in the first circuit, gave a very able opinion to the same effect, in the case of *Sherwood v. Sutton*, in New Hampshire;<sup>8</sup> and the learned judge thus explained the reason upon which he considered the exception as to fraud to be properly founded: "It is, that every statute is to be expounded reasonably, so as to suppress, and not to extend, the mischiefs which it was designed to cure. The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from starting up at great distances of time, when the evidence might no longer be within the reach of the

of water. And see also *Way v. Cutting*, 20 N. H. 187; *ante*, § 186, note. A false return of service on the defendant is a fraud on the part of the sheriff, and the statute does not begin to run till it comes to the knowledge of the party injured. *Foley v. Jones*, 52 Mo. 64.]

<sup>1</sup> 8 P. Wms. 148. See also, in Massachusetts, in confirmation of the above case in that State, *Homer v. Fish*, 1 Pick. 435; *Wells v. Fish*, 8 Ib. 74; *Farnam v. Brooks*, 9 Ib. 212.

<sup>2</sup> *Cole v. McGlathry*, 9 Greenl. (Me.) 131.

<sup>3</sup> And see in Maine, *Bishop v. Little*, 8 Greenl. (Me.) 445, and *Morton v. Chandler*, 8 Ib. 9. [And in New Hampshire, *Douglass v. Elkins*, 8 Foster, 26. And in South Carolina, *Beck v. Searson*, 8 Rich. Eq. 130.]

<sup>4</sup> *Jones v. Conoway*, 4 Yeates (Penn.), 109; *M'Dowell v. Young*, 12 Serg. & Rawle (Penn.), 128; *Rush v. Bar*, 1 Watts (Penn.), 110; *Pennock v. Freeman*, Ib. 491.

<sup>5</sup> *Harrisburg Bank v. Foster*, 8 Watts (Penn.), 12.

<sup>6</sup> *Raymond v. Simonson*, 4 Black. (Ind.) 85.

<sup>7</sup> *Mitchell v. Thompson*, 1 McLean (Cir. Co.), 85.

<sup>8</sup> *Sherwood v. Sutton*, 5 Mason (Cir. Co.), 148.

other party, by which they could be repelled. It ought not, then, to be so construed, as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation; and cases of fraud, therefore, form an implied exception, to be acted upon by courts of law and equity, according to the nature of their respective jurisdictions. Such, it seems to me, is the reason on which the exception is built, and not merely that there is an equity binding upon the conscience of the party, which the statute does not reach or control."<sup>1</sup>

187. The presumption is, that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it;<sup>2</sup> and the plea of the statute is not answered by the fact, that the action is founded on a simple breach of trust, or

<sup>1</sup> [Bowman v. Sanborn, 18 N. H. 205; Campbell v. Vining, 23 Ill. 525; Andrews v. Smithwick, 34 Tex. 544. In Massachusetts it is provided (R. S. c. 120, § 21) that where one who is liable to an action "shall fraudulently conceal the cause of such action from the knowledge of the person who is entitled thereto, the action may be commenced at any time within six years after the person who is entitled to bring the same shall discover that he has such cause of action;" and it was held, under this provision, that the concealment of property by an insolvent debtor from his assignees, and the concealment from a creditor of fraudulent acts, which, if known, would enable such creditor to avoid the debtor's discharge, do not constitute a fraudulent concealment from a creditor's cause of action so as to take the case out of the statute of limitations. Rice v. Burt, 4 Cush. (Mass.) 208. Nor is omission to disclose a trespass upon real estate, there being no fiduciary relation between the parties, and the owner having the means of knowing the facts, and nothing having been done to prevent his knowing them. Mudd v. Hamblin, 8 Allen (Mass.), 180. Nor is the investment of money by an attorney, instead of remitting as directed. Fleming v. Colbert, 46 Penn. St. 498. The concealment must be after the cause of action has accrued. Misrepresentation before and silence after will not prevent the running of the statute. Stanley v. Stanton, 36 Ind. 445.]

<sup>2</sup> 2 Story's Eq. Jur. § 1521. "What is reasonable diligence, it has been inquired, in the detection of such a Proteus as fraud? not to say any thing of the impossibility, in by far the greatest proportion of cases of fraud, of discovering when what would probably be termed knowledge of the fraud commenced. We really cannot see, moreover, why the lapse of a determinate period should not be a bar as well in cases of fraud as of tortious possession. It is obvious that the grand object of fixed periods of limitations, that of shortening titles and making them certain, cannot be adequately obtained, unless the rules are of universal application." These were the views of the English Real Property Commissioners, in reference to section 26 of the proposed new statute of limitations, which provided that, "in every case of a concealed fraud, the right to bring a suit in equity shall be deemed to have first accrued at, and not before, the time at which such fraud shall, or with reasonable diligence might, have been first known or discovered." London Legal Examiner, April, 1832, p. 69.

upon what is but a bare violation of an engagement, for allegations upon such grounds might be made in all cases.<sup>1</sup>

188. The case of *Farnham v. Brooks* in Massachusetts,<sup>2</sup> is one in which the positions just stated were involved and recognized, and applied, with great deliberation, to a peculiar state of facts. It was a bill in equity which sought to set aside a settlement of accounts and contract made between the defendant and the administrators of T. H., in the year 1808, the subject of which was an *insurance account* subsisting between T. H. and the defendant for several years, and not adjusted in the lifetime of T. H. The defendant was an insurance broker from the year 1785 to the year 1803, keeping an office, in which T. H. and divers other underwriters were accustomed to underwrite policies of insurance, and during that period a vast amount of insurance business was transacted under the particular care and inspection of the defendant, who was the general agent of that office, he keeping all the accounts for the underwriters, receiving premiums and paying losses, and receiving a commission for his services. It appeared, also, that there was a private agreement of copartnership between the defendant and T. H., not known to the other underwriters in the

<sup>1</sup> See *Cole v. McGlathry* (Opinion by Weston, J.), 9 Greenl. (Me.) 181. [*McKown v. Whitman*, 81 Me. 448; *Buckner v. Calcote*, 28 Miss. (6 Cush.) 482. A request by one of two indorsers of a note that suit be delayed against him, or that the other indorser be sued first, is no case for the interference of a court of equity. *Bank of Tenn. v. Hill*, 10 Humph. (Tenn.) 176. So where in an account settled between the parties the plaintiff has erroneously credited the defendants with an amount which for that reason he would be entitled to recover. *Brown v. Edes*, 87 Me. (4 Heath) 492. Nor is a denial on the part of the defendant, that he was part owner in a vessel, made when a portion of an account for repairs was presented to him, such a fraudulent concealment as to prevent him from availing himself of the plea of the statute. *Rense v. Southard*, 89 Me. (4 Heath) 404. But where the delay of the plaintiff to seek relief was occasioned, in part at least, by the promise of the defendant to rectify the errors complained of, the existence of such errors came to the knowledge of the plaintiff gradually, and the circumstances of the case were such that the defendant could suffer nothing by the delay, it was held that the plaintiff was not precluded from relief on the ground that he had not sought it within reasonable time. *Callender v. Colegrove*, 17 Conn. 1. And where it is agreed between the assignor and assignee of a promissory note, at the time of the assignment, that the assignee need not demand payment of the maker before a certain time, it is no laches in the assignee not to commence suit on the note before that time. *Nance v. Dunlavy*, 7 Blackf. (Ind.) 172. When the limitation is by agreement, as in an insurance policy, it is generally held that any conduct on the part of the insurers, which leads the insured to delay, is a waiver of the limitation. *Black v. Winnisheik Ins. Co.*, 81 Wis. 74; *Fullam v. N. Y. Union Ins. Co.*, 7 Gray (Mass.), 61; *May on Insurance*, § 488. And see further, *post*, § 190.]

<sup>2</sup> *Farnam v. Brooks*, 9 Pick. (Mass.) 212.

office, in virtue of which the defendant became interested in one-fourth part of all sums underwritten by T. H., in regard to premiums and losses. This copartnership commenced in October 1794, and continued until June, 1808, when the defendant discontinued keeping the office; at which time there were large balances due to T. A., which remained unadjusted till his death. In January, 1808, T. H. died intestate, and soon afterwards administration of his estate was committed to two of his relatives. On the fourth day of April, 1808, the defendant paid to the administrators sixty thousand dollars, as and for a full settlement and discharge of all the claims of T. H.'s estate against him, and the administrators having received that sum, subscribed a receipt of that date for the above-named sum in full for the whole underwriting account of T. H. deceased, in the office formerly kept by the defendant, from the period of T. H.'s first beginning to underwrite in the defendant's office, up to that date. It was stated in the receipt, that the agreement between the administrators and the defendant was, that the underwriting account of T. H., with all its advantages and with all its disadvantages, be wholly the property of the defendant, in like manner as if the defendant had been the original underwriter instead of T. H. The object of the bill was to defeat the *prima facie* legal effect of this receipt, and it alleged, with other things, that sums were omitted in the defendant's statement which ought to have been credited, and others charged which ought not to have been debited to T. H.'s estate; and that there was presented to the administrators a list of claims against the insurance account of T. H. which was exaggerated and *false*; and that, upon this statement and list of claims, the administrators, *supposing them to be true, and reposing confidence in the defendant*, were induced to accept his offer of sixty thousand dollars, and give him the receipt and discharge above mentioned. The answer denied all unfair advantages taken of T. H. in his lifetime, or of his administrators afterwards, and alleged, among other things, that the person selected by the administrators and the defendant to examine the books did so, aided by the defendant, to his full satisfaction, and then recommended to the administrators to accept the offer of the defendant, and that they did so without any misrepresentation on his part, and received the money, and thereupon signed the receipt and transfer above mentioned, in the presence of one A. B., their confidential friend and adviser. The



great object of the bill, the court considered, was to open the whole account between the parties, and after the lapse of twenty years to investigate and explain complicated concerns of many years of most extensive and intricate business; and the counsel for the plaintiff, the court said, aware of the position in which they stood, had undertaken to maintain it by the allegation of *fraud* on the part of the defendant in procuring the settlement which was sought to be avoided. Not that they made a direct allegation to that effect, but they asserted that the facts therein stated constituted fraud, if not direct, of a constructive nature, such as is holden, in courts of equity, sufficient to vitiate any contract or bargain. If the ground the plaintiffs took could be maintained, the relief they sought belonged to them, unless for other causes the relief must be withheld. Such a cause was supposed to exist in the *statute of limitations*, which was insisted on in the answer as a bar to the bill, and which the court discussed in its application to the case, after having treated of other parts of the case. One part of the case, and the last ground taken for avoiding the contract, was, that, in making the settlement above stated, the defendant omitted to mention claims existing in the nature of salvage against the government of Spain, for illegal captures, which claims, at the time of the settlement, were thought to be of little or no value, but afterwards, by reason of a treaty between Spain and the United States, became of great value. It was *held*, that, as the statement of the defendant did not purport to give an account of the sources from which, by possibility, advantages might accrue, and as all such claims might be traced in the defendant's books exhibited to the administrators of T. H. ; and the defendant, in his answer, stated that they escaped his recollection, the omissions did not show actual or constructive fraud on the part of the defendant; so that the compromise could not be set aside, and the benefit of those claims belonged to the defendant, the words being broad enough to embrace them. But the defendant had made a written statement to T. H., which came into the hands of the administrators, showing a balance of \$64,688 in the hands of the defendant, and a list of outstanding claims against the insurance account of T. H., and, upon this statement and list of claims, the administrators, by the advice of an agent employed by them to examine the defendant's books, were induced to make the settlement. In 1827, after the death of the administrators and of their agent, the administrator



*de bonis non*, brought the present bill in equity to set aside the receipt and agreement, on the ground of constructive fraud on the part of the defendant, or at least to surcharge and falsify. From an examination of the books by an accountant, employed several months for that purpose by the plaintiff, it appeared that the balances in favor of T. H. amounted to \$64,688, according to the defendant's written statement, but that there were errors in the book, which, if corrected, would have increased that sum to \$68,276. The defendant admitted there were errors, but not to the amount stated in the account. It was *held*, in reference to the statute of limitations, that the statute does not apply to direct trusts created by deed or will, and perhaps not to those created by appointment of law, such as executorships and administrations; but constructive trusts arising from partnerships, agencies, and the like, are subject to the statute; that in a court of equity there was as much force to be given to the statute when pleaded to a bill, as to an action at law; that is, by showing that *there had been a concealment*, and that the discovery of the fraud was only within six years; that if the aggrieved party *knew of the fraud*, when it was committed, or had full possession of the *means of detecting it*, which is *the same* as knowledge, neglect to bring his complaint for more than six years will deprive him of his remedy, and ought to upon the very principles and reasons on which the statute of limitations was enacted. The court apprehended, that if they should sustain a bill founded on fraud, committed more than six years before the filing of the bill, without any proof of the actual concealment of it, they would, to a great extent and in a large class of cases, judicially repeal the statute, which would be a usurpation of power.<sup>1</sup> But the difference between \$64,688, the sum named in the defendant's written statement, and \$68,276, the sum which should have been named, was deemed so important an error in the basis of the settlement, as to have affected the compromise, and the plaintiff was therefore permitted to surcharge and falsify, *the defendant's admissions having taken this part of the case out of the statute.*<sup>2</sup>

<sup>1</sup> In support of this part of the opinion of the court, the court relied upon the multitude of authorities collected, and ably reviewed and compared by Chancellor Kent, in the case of *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90-114. And see *Hawley v. Cramer*, 4 Cow. (N. Y.) 718, *in equity*.

<sup>2</sup> In cases of settled accounts, a court of equity will not generally open the account; but will at most only grant liberty to surcharge and falsify, unless in cases of apparent

189. In the case of *Bishop v. Little*,<sup>1</sup> the plaintiff being in the possession of certain land in the State of Maine, claimed by the *Pejepscot* proprietors, for whom the defendant assumed to act as agent, paid to the defendant a certain sum of money, and received a deed. At the time, the plaintiff's agent expressed his fears that the title of the proprietors did not extend so far as to include the land occupied by the plaintiff. But the defendant affirmed that it did, and said that, if the deed that he was about to give to the plaintiff should not convey to him a good title thereto, he would make it good. Upon this assurance the money was paid, and a deed of release and quitclaim was made to the plaintiff. Within six years prior to the commencement of the plaintiff's action of assumpsit, but more than six years after the payment of the money and the delivery of the deed, it was ascertained that the title of the proprietors did not extend so far as to cover the plaintiff's farm; and he thereupon brought his suit to recover back the purchase-money and interest. The court held, that when the deed was made and delivered to the plaintiff, the proprietors had then no title to the land therein described; and that, if the plaintiff ever had a right to recover back the consideration, he had one then, and the failure of consideration, if ever, was at that moment. It was urged, by the plaintiff's counsel, that, as this want of title was not discovered until within six years, the statute was no bar; that it did not commence running till the discovery was made. Such, however, the court said was not the law; and they asserted, that no case could be found where the statute had been avoided, at law or in equity, unless on the ground of *fraudulent concealment* on the defendant's part. There was, moreover, in the perception of the court, no principle of law which could save the cause from the operation of the statute.<sup>2</sup>

fraud. 1 Story, Eq. Jur. 501. Where the bar of the statute against an account of ten years' standing is repelled by an *admission*, that the account is open, and a promise to settle it, the length of time will not of itself operate as a bar; but it may, connected with other circumstances, be sufficient to induce the court to require evidence of the claim so clear, consistent, and natural, as to amount to positive and almost conclusive proof. *McLin v. McNamara*, 1 Ired. (N. C.) Eq. 75.

<sup>1</sup> *Bishop v. Little*, 8 Greenl. (Me.) 405.

<sup>2</sup> [Where it appeared that the improvements in a tract of land had been conveyed by the defendant to the plaintiff in equity, in 1818, and that an agreement had been made between them, that the defendant was to keep possession for two years, and then quietly leave, and put the plaintiff in; but, before the expiration of the two years, the defendant held the possession under a title from the proprietor of the land, and within

190. Courts of equity will not interpose if a party slumber upon his right unreasonably, after the detection of fraud, or the means afforded of detection. A purchase made by an administrator of one of the distributees, shortly after the latter became of age, of all his interest in his father's personal estate, the administrator having rendered no inventory of the estate, or stated an account, and the purchase having been made at a grossly inadequate price, was considered fraudulent and voidable, at the election of the distributee, if application had been made for that purpose within a reasonable time afterwards, or within a reasonable time after *obtaining knowledge* of the fraud. But a court of equity, after the lapse of eleven years from the making of such contract, will not lend its aid to rescind it, and compel the administrator to account; the distributee having, when the contract was made, or soon afterwards, knowledge of circumstances sufficient to put him on inquiry. However true it may be, said the court, that time does not commence running until after discovery of the fraud, if a considerable period of time has elapsed before the discovery of the fraud, the efflux of time already passed should quicken the diligence of one who desired to avoid a contract for that cause, especially in a case where, by the exercise of any diligence, the true state of the case might have been known at an earlier period.<sup>1</sup>

191. In the case of *Harrisburg Bank v. Foster*, in Pennsylvania,<sup>2</sup> the court, after citing the case in Massachusetts, of Turnpike Company, as authority for their opinion, that fraud may be successfully

three years of the filing of the bill procured a conveyance of the land to himself, and refused to relinquish the possession to the plaintiff,—it was held, that the statute of limitations was no bar to the relief sought for by the bill in equity. *Chapman v. Butler*, 22 Me. 191.]

<sup>1</sup> *Johnson v. Johnson*, 5 Ala. 90 (New Series, 1844). [*Veazie v. Williams*, 8 Story (U. S.), 611; *Gould v. Gould*, Ib. 516; *Stokes v. Lebanon, &c.*, 6 Humph. (Tenn.) 241; *Young v. Cook*, 80 Miss. (1 George) 320; *Browne v. Cross*, 7 Eng. Law & Eq. 263. In this case the Master of the Rolls said: "Courts of equity have always considered it of the greatest importance that parties should not sleep on their rights." *Champion v. Rigby*, 1 Russ. & Myl. 589; and affirmed by Lord Cottenham, 18th March, 1846. If the mere allegation of fraud enabled any one to open transactions many years after he had notice of it, this doctrine might itself be the means of perpetuating the greatest frauds in cases where, the evidence being lost by the lapse of time, an innocent party might be left defenceless. See also *Ferson v. Sanger*, 1 W. & M. (U. S.) 138; *Gilpin v. Smith*, S. & M. (Miss.) 109; *Keeton v. Keeton*, 20 Mo. (5 Bennett) 580; *Moore v. Greene*, 2 Curtis, C. C. 202; *McLure v. Ashby*, 7 Rich. Eq. (S. C.) 430.]

<sup>2</sup> *Harrisburg Bank v. Foster*, 8 Watts (Penn.), 12.

replied to a plea of the statute, held, that the cashier of a bank cannot avail himself of the statute to defeat an action on his note by the bank, unless he can show clearly a performance of all his duties in relation to the note, in exhibiting the same as due and unpaid, to the board of directors. The knowledge of the president, or of the individual directors of the bank, that the note was due and unpaid, is not a fact from which negligence can be inferred on the part of the bank, so as to allow the operation of the statute in favor of the cashier.

## CHAPTER XIX.

## EXCEPTION OF PERSONS UNDER DISABILITIES.

192. It is provided by the seventh section of the statute of James, that if any person entitled to bring any of the personal actions therein mentioned shall be, at the time of the cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, such person shall be at liberty to bring the same actions within the times limited by the statute, after his disability has terminated.<sup>1</sup> A person held in slavery is "imprisoned," within the meaning of the proviso in the statute.<sup>2</sup>

193. An attempt was made not many years since, by the counsel, in *Piggot v. Rush*, in the King's Bench,<sup>3</sup> to support a construction of this section of the statute entirely different from the one which had become established. The decision in the case was, that if a party who is under the disability of imprisonment, when the cause of action accrues, commence an action of *indebitatus*

<sup>1</sup> Since the statute authorizing married women to sue, it is held in Maine that the disability of coverture is abrogated. *Brown v. Cousens*, 51 Me. 801. And of infancy, also, if the married woman be an infant. *Thompson v. Craig*, 24 Texas 582. *Choses in action* of the wife, accruing during coverture, vest immediately in the husband the right to sue for them, and the statute then begins to run. *Cook v. Lindsey*, 34 Miss. (5 George) 451. The statute begins to run against a *non compos* at the time of a recovery from lunacy, and is not interrupted by a recurrence of the lunacy. *Clark v. Trail*, 1 Met. (Ky.) 85. So if a *feme covert* becomes a widow, and marries again; the second marriage does not interrupt the currency of the statute. *Mitchell v. Berry*, 1 Met. (Ky.) 602.

<sup>2</sup> *Matilda v. Cranshaw*, 4 Yerg. (Tenn.) 299. [And the statute runs from the date of emancipation. *Price v. Slaughter*, 1 Cin. (Ohio) 429. The party who sets up disability must prove it clearly. *Hall v. Timmins*, 2 Rich. (S. C.) 120. A person for whose use a suit is brought is entitled to the benefit of any disability to which he would have been entitled had the suit been in his own name. *Davis v. Sullivan*, 2 Eng. (Ark.) 449. But the grantee of one who could have availed himself of the disability of infancy cannot avail himself of that exception. *Williams v. Council*, 4 Jones, Law (N. C.), 206. And where a party shows himself within an exception, he will be presumed to remain within it until such time as will take the case out of the statute, unless the contrary appear. *Ibid.*]

<sup>3</sup> *Piggot v. Rush*, 4 Adol. & Ell. 912.

*assumpsit*, after the time limited by the statute has passed, — but during the continuance of the imprisonment, — the operation of the statute is barred by the saving clause in this section. But it was contended, by the counsel, that none of the words mentioned in that proviso, applied to *assumpsit*; for, although it had been so held,<sup>1</sup> yet it was at a time when courts leaned strongly in favor of restricting the operation of the statute; and that latterly it had been construed as one passed “for quieting men’s estates and of avoiding suits;” and that many of the early decisions had been overruled on this ground. Lord Denman said, the court could not overrule the cases, which had decided that the action of *assumpsit* was included in the statute; and, though he thought them rather wrong, the omission was so palpably unintended, that the courts were perhaps justified in straining the language. Littledale, J., said: “We are bound by the cases. If it were *res integra*, I should be of a different opinion.” Patterson, J.: “We cannot decide in favor of the defendant without overruling those cases.” Coleridge, J.: “We cannot overrule cases which have been followed by such invariable practice.”

194. But in respect to *persons*, the statute has been less liberally construed. It was contended in the Supreme Court of New York,<sup>2</sup> that the case came within the *equity* of the section above mentioned; that the defendant had been discharged under an insolvent act; and that the discharge would prevent the statute from running against an action of *assumpsit*, upon a contract made before that act, and the money not falling due on the contract until after the discharge. But the court held otherwise, and said: “Though the defendant’s virtual protection from prosecution by his discharge produces the same result as his *absence from the State*, yet we are not warranted by any rule of construction, in deciding, that every cause which produces the same effect, as the one mentioned in the act, comes within it. It is true that the reason why the absence of the defendant from the State excuses the plaintiff from prosecuting, is, that the defendant is beyond the reach of the process of the courts; and the defendant’s discharge placed him equally without the reach of any recovery against him, till the decision of the Supreme Court of the United States, in *Sturgis v. Crowninshield*. But it is not for the court to extend the law to

<sup>1</sup> See *ante*, Ch. IX. § 70.

<sup>2</sup> *Sacia v. De Grapp*, 1 Cow. (N. Y.) 358.

all cases coming within the *reason* of it, so long as they are not within the *letter*." Indeed, there appears to be no authority, in favor of the doctrine, that if the persons mentioned in the above section are not expressly excepted from the operation of the statute of limitations, there exists a *virtual* exception. But it has been holden, that no exception can be claimed, unless expressly mentioned.<sup>1</sup> General words of a statute, it is considered, must receive a general construction; and unless there can be found in the statute itself some ground for restraining it, it cannot be restrained by arbitrary addition or retrenchment. And on this principle, it was adjudged by Sir William Grant, that *absentees*, who are not expressly excepted in the act of limitations of Jamaica, were intentionally rejected, and therefore could not be introduced by construction.<sup>2</sup> And it was also declared by Sir Eardly Wilmot, in the House of Lords, that *infants*, like other persons, would be barred by an act for limiting suits at law, if there was no saving clause in their favor.<sup>3</sup> To enforce the policy of the statute limiting suits against executors and administrators, the statute is an absolute bar; and the fact of the plaintiff's having been under the disability of infancy, during the time that the estate of the deceased was under administration, will not prevent his claim from being barred by the lapse of the time limited by such statute.<sup>4</sup>

<sup>1</sup> [Bucklin v. Ford, 5 Barb. (N. Y.) Sup. Ct. 393; The Sam Slick, 2 Curtis, C. C. 480; Howell v. Hair, 15 Ala. 194; United States v. Maillard, 4 Ben. (Dist. Ct. U. S.) 459. And see *post*, § 485. But, when the statute does not in terms limit a particular case, the court will not extend it, although the case comes within the reason of the statute. Thus, in Illinois, where the action of debt will lie wherever *indebitatus assumpsit* will, and justices of the peace have jurisdiction of both actions, the summons being the same in both forms of action, where the statute of limitations is pleaded, the law will presume that to be the particular form which is best calculated to advance the plaintiff's remedy. Bodell v. Janney, 4 Gilm. (Ill.) 198. So the Alabama act, which permits an action to be commenced within a year after the reversal of a previous judgment, was held, in favor of the plaintiff, to apply to a case where, by the action of the inferior court, the cause was discontinued as to two of the defendants, and thus caused a reversal of the judgment as to the other defendant, although not within the letter of the statute. Givens v. Robbins, 11 Ala. 356.]

<sup>2</sup> Beckford v. Wade, 17 Ves. 87.

<sup>3</sup> Buckinghamshire v. Drury, cited in the above case. The disability of being "beyond the seas," generally provided for, is omitted in the statute of New Jersey (see App. p. lxix.), and consequently is not recognized by the courts. Beardsly v. Southmayd, 3 Green (N. J.), 171; Taberrer v. Brintnall, 8 Harr. (N. J.) 262.

<sup>4</sup> Hall v. Bumstead, 20 Pick. (Mass.) 2. [The statute will not be prevented from running by the disability of the heir, if the executor had a right of action. Darnall v. Adams, 18 B. Mon. 278.]



195. The statute has never been so construed as to prevent a person laboring under any disability from suing at any time during the disability. And, in a case reported by Saunders, the action was by an infant suing by his guardian. It was said that the infant should have waited until full age, because the six years were elapsed during his infancy, and therefore he could only pursue his action, according to the words of the saving clause of the act, which is six years *after his full age*. But this was not regarded by the court, and the reporter adds, the infant may well pursue his remedy at any time, within age, although the six years have elapsed.<sup>1</sup>

196. The invariable construction, which has been given to the saving, is, that where it is incumbent on the plaintiff to prove that he labored under any disability, he must show, that it was a continuing disability from the first, and that when the statute has once begun to run, no subsequent disability will impede it. If, therefore, a plaintiff be in England, when his right to sue on any personal demand accrues, and he then depart beyond seas, and the time limited has elapsed, he and his representatives will be barred.<sup>2</sup> And in the Supreme Court of the State of New York, where the services of the plaintiff were rendered before August, 1796, and the suit not commenced till December, 1802, as there had been a lapse of more than six years, it was held, that a disability created by absence, after the statute had begun to run, would not restrain it.<sup>3</sup>

<sup>1</sup> *Chandler v. Villett*, 2 Saund. 117, c. 1; *Ib.* 215.

<sup>2</sup> *Smith v. Hill*, 1 Wils. 184. [And see *ante*, § 192, note.]

<sup>3</sup> *Peck v. Randall*, 1 Johns. (N. Y.) 165; and see *Dennis v. Anderson*, 2 Hen. & Munf. (Va.) 289; *Dowell v. Webber*, 2 Smedes & Mar. (Miss.) 452. [*Landes v. Perkins*, 12 Miss. 288; *post*, § 477; *Dillard v. Philson*, 5 Strobb. (S. C.) 218; *Smith v. Newby*, 18 Miss. 159; *Pendergrast v. Foley*, 8 Ga. 1; *Greenl. Ev.* 2, § 489; *Byrd v. Byrd*, 28 Miss. (6 Cush.) 144; *Brown v. Merrick*, 16 Ark. 612; *Skidmore v. Romaine*, 2 Bradf. (N. Y.) 122; *Workman v. Guthrie*, 29 Penn. St. 495. But in some of the States there are statutory exceptions to this rule, and in others the courts have made them. See *Lawrence v. Trustees, &c.*, 2 Denio (N. Y.), 577. So in Texas, a debt barred by the statute of another State before the immigration of the debtor, is barred there also; but the whole period prescribed by the statute of the foreign State must have elapsed, and the rule, that, when the statute once begins to run, nothing can stop it, does not apply. *Hays v. Cage*, 2 Texas, 501. The running of the statute of limitations is suspended by an injunction. *Little v. Price*, 1 Md. Ch. Dec. 182; *Moore v. Crockit*, 10 Humph. (Tenn.) 865; *Hutsonpiller v. Storer*, 12 Gratt. (Va.) 579; *Doughty v. Doughty*, 2 Stockt. (N. J.) 847; *Wilkinson v. Flowers*, 87 Miss. (8 George) 579; *Sands v. Campbell*, 81 N. Y. (4 Till.) 845. And by proceedings in equity, even before a court which has no jurisdiction of certain parties compelled to come in under a

197. It is the settled construction, that the period cannot be extended by the connection of one disability with another. Where a *feme sole* infant, entitled to the possession of personal property, made a demand thereof, and afterwards during the infancy became covert, and so continued until the suit was brought, it was held, that the cause of action accrued at the time when the demand was made; and that the action, having been commenced more than six years after she became twenty-one years of age, it was barred by the statute.<sup>1</sup> The defendant had given a note of hand to the plaintiff, who, for seventeen months after the note became due, was of sane mind, but afterwards became *non compos*, and so continued till more than the time limited had elapsed; the *insanity*, it was

penalty, as to such of those parties as came in. *Barrow v. Shields*, 18 La. An. 57. But an injunction against selling mortgaged land does not prevent the holder of the mortgage note from proceeding at law on the note, and therefore does not have the effect to suspend the operation of the statute. *State Bank v. Byrd*, 14 Ark. 496. *Yale v. Randle*, 28 La. An. 579. In Virginia, in a process of foreign attachment, the fund trusted is regarded as in the custody of the law, so that pending the suit the garnishee cannot be sued, and the running of the statute in his favor is suspended. *Mottingly v. Boyd*, 20 How. (U. S.) 128. And see *ante*, §§ 68, 104; *King v. Baker*, 29 Penn. St. 200. But *contra*, *Ingraham v. Regan*, 28 Miss. (1 Cush.) 218. And by an assignment under the insolvent laws of Massachusetts. *Willard v. Clarke*, 7 Met. (Mass.) 485; *Hagood v. Robinson*, 7 Rich. (S. C.) 48; *Succession of Flower*, 12 La. An. 216. And see *ante*, § 167, n. § 194. But as by the insolvent laws of Massachusetts the debtor may be sued during the pendency of the proceedings, the running of the statute is not suspended as between him and his creditors. *Collister v. Hailey*, 6 Gray, 519; *Stoddard v. Doane*, 7 Ib. 387; *Richardson v. Thomas*, 18 Gray (Mass.), 381. A mere agreement to submit to arbitration will not suspend the statute. *Cowart v. Perrine*, 8 Green (18 N. J.), 454. But it seems that an actual submission will, pending the submission; s. c. 6 Green (21 N. J.), 101. A report and declaration of insolvency on an intestate estate is a defence only to the administrator by whom it is made, and does not suspend the operation of the statute after the expiration of that administration, when the statute begins to run and continues to run, notwithstanding a vacancy in the administration. *Reed v. Minell*, 30 Ala. 61; *Tarbell v. Parker*, 106 Mass. 347. Statutes of limitation are suspended during a state of war as to matters in controversy between citizens of the opposing belligerents, notwithstanding they may have begun to run before the war. *Jackson Ins. Co. v. Stewart*, U. S. C. C. Md. Dist. Am. Law Reg. N. S. 6, 732. And see note to same case. *Semmes v. Hartford Ins. Co.*, 18 Wall. (U. S.) 158; *Kaufman v. Kaufman*, U. S. Sup. Ct. Ch. L. N. Jan. 31, 74; *Harrison v. Henderson*, 7 Heisk. (Tenn.) 815, overruling *Girdner v. Stevens*, 1 Heisk. (Tenn.) 280, *contra*; *Underwood v. Phoenix Ins. Co.*, Sup. Ct. (Tenn.) Oct. 78; *Brown v. Hiatts*, 15 Wall. (U. S.) 177; *Perkins v. Rogers*, 85 Ind. 124.]

<sup>1</sup> *Butler v. How*, 1 Shep. (Me.) 397. [*Wellborn v. Weaver*, 17 Ga. 267; *Ford v. Clements*, 18 Texas, 592; *Keeton v. Keeton*, 20 Mo. 580; *White v. Latimer*, 12 Texas 61; *Ashbrook v. Quarles's Heirs*, 15 B. Mon. 80; *Clark v. Jones*, 16 Ib. 121; *Fritz v. Joiner*, 54 Ill. 101.]

held, did not suspend the statute, which, having once begun to run (at the time of action accrued), continued, notwithstanding the disability supervened.<sup>1</sup> But it is not necessary to multiply authorities upon this point. The same rule holds in personal as in real actions; and in the case of *Mercer v. Selden* (an action of ejectment), upon a review of the leading authorities, the Supreme Court of the United States, as lately as 1843, held that disabilities which bring a person within the exception of the statute cannot be piled one upon another; and that the party claiming the benefit of the exception in the statute can avail himself only of the disability existing when the right of action first accrued.<sup>2</sup> Although

<sup>1</sup> *Adm'r of Anderson v. Smith*, 2 M'Cord (S. C.), 269. *Semper furibundus præsimitur* is a supposition of law grounded on the nature of insanity, and on the experience, that by far the greatest number of those who are thus unfortunately visited never entirely recover their mental faculties. This rule, connected with another, which denies to such persons the power of legal disposition, provides an effectual safeguard against imposition and fraud. The statute of limitations is not confined to the permanently deranged. It applies with equal force to *lunatics*, who, properly speaking, are persons intellectually disordered, but with lucid intervals. Selections from D'Auguesseau; Pothier on Obligations, App. 579; Matthews on Presumptive Evidence, 18. It might, perhaps, be objected that persons of this description ought not to be regarded as constantly subject to mental aberration. But this objection has not been allowed to prevail. Because it is possible that a prudent act may be performed, while the will of the agent is not subject to the control of right reason. It is, therefore, settled, that where the fact of *lunacy* is proved generally, a lucid interval shall not be presumed; but the sanity and legal competency of the party must clearly and positively appear. And the evidence must go to prove not merely a cessation of the violent symptoms of the disorder, but a restoration of the faculties of the mind sufficient to insure the exercise of a sound discretion. Per Sir William Grant, in *Hall v. Warren*, 9 Ves. 611; *White v. Wilson*, 18 Ib. 88; 1 Fonb. Eq. 71. "It is not a deceitful and faithless stillness which follows or forebodes a storm, but a sure and steadfast tranquillity for a time, a real calm, a perfect serenity; in fine, without looking at so many metaphors to represent our idea, it must be not a mere diminution, a remission of the complaint, but a kind of temporary cure, an intermission so clearly marked as in every respect to resemble the restoration to health." D'Auguesseau, as above. Many times, says Littleton, the *Latin* word explaineth the true sense, and calleth him not *amens*, *demens*, *furiosus*, *lunaticus*, *futuus*, *stultus*, or the like; for *non compos mentis* is most sure and legal. Co. Litt. 246, b; *Vid. Beverley's Case*, 4 R. 123. A person deaf and dumb from his nativity is not an idiot, or *non compos mentis*, though this may be the legal presumption, until his mental capacity is proved on inquiry for that purpose. *Brower v. Fisher*, 4 Johns. Ch. 441. [He is *prima facie non compos*. *Oliver v. Berry*, 53 Me. 206.]

<sup>2</sup> *Mercer v. Selden*, 1 How. (U. S.) 87. And see *post*, Ch. respecting Possession of Land in relation to persons under disability. [*Dease v. Jones*, 28 Miss. (1 Cush.) 138; *Starke v. Starke*, 8 Rich. (S. C.) 488; *Caldwell v. Thorp*, 8 Ala. 253; *Stevens v. Bomar*, 9 Humph. (Tenn.) 546; *Dugan v. Gittings*, 8 Gill (S. C.), 188; *Thorp v. Raymond*, 16 How. (U. S.) 247; *Tyson v. Britton*, 6 Texas, 222. Nor can there be

in South Carolina, in cases affecting the possession of lands, it is now by special legislative enactment otherwise provided, yet when the statute has once begun to run, in personal actions, it will continue to run on notwithstanding any intervening disability, and agreeably to the well-settled and long prevailing English rule.<sup>1</sup> But where a legacy to a daughter was payable on her marriage, or when she became of age, and she married before arriving at full age, in a suit brought by her and her husband for the legacy, after the lapse of six years, it was held, that she came within the exception in favor of *femes covert*; her right not accruing until after her marriage.<sup>2</sup>

198. Where there are several *coexisting* disabilities in the same person when his right of action accrues, he is not obliged to sue till all are removed.<sup>3</sup> Lord Hardwicke states the law plainly: "If a man both of non-sane memory and out of the kingdom come into the kingdom and then go out of the kingdom,—his non-sane memory continuing,—his privilege as to his being out of the kingdom is gone; and his privilege as to non-sane memory will begin from the time he returns to his senses."<sup>4</sup>

any tacking of disabilities existing in different persons, as the mother's upon that of the children. *Mitchell v. Berry*, 1 Met. (Ky.) 602. Although where there are successive owners of the cause of action for equitable relief, and the right to prosecute arises in the time of the first, the period of limitation commences at that time and continues attached to the demand during the several subsequent changes of both, so that when the statute period has elapsed the demand is barred, though the last proprietor had recently acquired his right; yet, if the first legal proprietor of the claim is a trustee having no interest, the cause of action (as, for instance, the right to foreclose a mortgage) may be regarded as vesting in the *cestui que trust*; and, if she were then under the disability of infancy, the statute does not begin to run as against her until her majority. *Bucklin v. Bucklin*, 1 Abb. Ct. of App. Dec. (N. Y.) 242.]

<sup>1</sup> *M'Cullough's Adm'x v. Speed*, 8 M'Cord (S. C.), 455. See also *Barino v. M'Gee*, 1b. 452; *Fewell v. Collins*, 1 Const. (S. C.) 202. This construction is consistent with statutes of limitation. They are statutes, as has often been asserted by courts of justice, "of repose." Without it, a right might travel for a very long period, in direct contravention of the intent and principles of those statutes. As has been asserted by Lord Eldon, in respect to real actions, "it might travel through minorities for centuries." General words in a statute must receive a general construction; and, if there is no express exception, the court can make none. Per Chancellor Kent, in *Demarest v. Wynkoop*, 8 Johns. (N. Y.) Ch. 129.

<sup>2</sup> *Wood v. Aiken*, 1 Paige (N. Y.), Ch. 616. [*Brown v. Crawford*, 9 Humph. (Tenn.) 164; *Sledge v. Clopton*, 6 Ala. 589.]

<sup>3</sup> See Plowden, 875.

<sup>4</sup> *Start v. Mellish*, Atk. 610. [See *Keeton v. Keeton*, 20 Mo. 580]; *Demarest v. Winkoop*, *supra*; *Butler v. Howe*, 1 Shep. (Me.) 397. [If property, belonging to an

199. There is never a legal *merger* of one disability with another. The marriage of a *feme* infant, for example, will not merge the disability of infancy in that of coverture, so as to require her and her husband to bring their actions within the time limited, after their marriage. She is entitled to six years after coming of age.<sup>1</sup>

200. As to the term *beyond seas*, it was held by Lord Holt, that Dublin, or any place in Ireland, is *beyond seas*.<sup>2</sup> But where the plaintiff replied that he was resident in foreign parts, out of the kingdom of England, namely, at Glasgow, in Scotland, the replication was held bad, and it was said he must be "beyond the seas."<sup>3</sup> In this country, it was held, that the maker of a promissory note who was within the British lines, during the war of the Revolution, when the British army had possession of a part of the State of New York, and who departed with that army at the termination of the war, was "out of the State" during that period, and therefore not entitled to plead the statute in bar. He was considered out of the jurisdiction of the State, and *quasi* out of the realm.<sup>4</sup> It may now be considered as an established general rule, that, in this country, "beyond seas" and "out of the State" are analogous expressions, and must have the same meaning.<sup>5</sup> In the Supreme Court of the United States, in the year 1818, the statute of limitations of the State of Georgia was pleaded in an action of ejectment, and the only question the case presented was, whether the plaintiff, who resided in Virginia, came within the exception in favor of persons "beyond seas;" and Johnson, J., who gave the opinion of the court, said the court were unanimously of opinion that the words "beyond seas" must be held to

infant, is converted during his minority, the statute will begin to run against him upon his arrival at full age in favor of the *tortfeasor*, notwithstanding the property be removed without the State, unless prevented by some exception in the statute. *Jordan v. Thornton*, 7 Ga. 517.]

<sup>1</sup> Or by the statute of South Carolina, to four years. So expressly held in *Robertson et ux. v. Wurdeman*, 2 Hill (S. C.), 324. [*Lagton v. The State*, 4 Harr. (Del.) 8; *Carter v. Cantrell*, 16 Ark. 154; *Martin v. Letty*, 18 B. Mon. (Ky.) 578.]

<sup>2</sup> *Anon.* 1 Show. 91. [The words "beyond the seas" are synonymous with "out of the territories," "out of the realm," "out of England," and are not to be taken literally. And there is no such thing as a constructive inhabitancy within the jurisdiction, within the meaning of that clause. *Ruckmaboge v. Motticund*, 32 Eng. Law & Eq. 84.]

<sup>3</sup> *King v. Walker*, 1 W. Bl. 286.

<sup>4</sup> *Sleight v. Kane*, 1 Johns. Cases (N. Y.), 76. And see *Ruggles v. Keeler*, 8 Johns. (N. Y.) 267; *Fowler v. Hunt*, 10 Ib. 464.

<sup>5</sup> As per Chief Justice Marshall, in *Faw v. Roberdeau*, 8 Cranch (U. S.), 174.

be equivalent to "without the limits of the State."<sup>1</sup> At a very considerable later period, the same high tribunal held, in reference to the act of limitations of Maryland, that the words "beyond seas," in that act, are manifestly borrowed from the statute of James; and that it had always been held, that they ought not to be interpreted according to their literal meaning; but ought to be construed as equivalent to the words "without the *jurisdiction* of the State."<sup>2</sup> And the same exposition has been established in the courts of Maryland,<sup>3</sup> South Carolina,<sup>4</sup> and Massachusetts.<sup>5</sup> In the act of limitations of Kentucky, the expression "out of the country" is substituted for the expression "beyond seas," and has been construed to mean "out of the State;"<sup>6</sup> though the act is, notwithstanding, considered to run against citizens of Virginia, who visited Kentucky, after the cause of action accrued, while it composed a part of Virginia.<sup>7</sup>

<sup>1</sup> *Munay v. Baker*, 8 Wheat. (U. S.) 341.

<sup>2</sup> *Bank of Alexandria v. Dyer*, 14 Peters (U. S.), 141.

<sup>3</sup> *Brent v. Tasker*, 1 Har. & M'Hen. 89; *Pancoast v. Addison*, 1 Har. & Johns. (Md.) 350.

<sup>4</sup> *Forbes v. Foot*, 2 M'Cord (S. C.), 331. [And in Georgia, *Denham v. Holeman*, 26 Geo. 182.]

<sup>5</sup> *White v. Bailey*, 8 Mass. 271; *Byrne v. Crowninshield*, 1 Pick. (Mass.) 263. In Massachusetts, a citizen of another State, who has never been in the Commonwealth, is not a person beyond sea, without any of the United States, and therefore is not within the saving clause of the statute of 1786. *Whitney v. Goddard*, 20 Pick. (Mass.) 304. [The cases from 8 Mass. and 1 Pick. cited by the author, turn upon what constitutes a return within the State, and apply to defendants only. The statute then as now (Rev. Stat. c. 120, § 6) excepted persons "absent from the United States."]

<sup>6</sup> *Musel v. Israel*, 3 Bibb (Ky.), 510.

<sup>7</sup> *May v. Slaughter*, 8 Marsh. (Ky.) 507. [In New Hampshire, "beyond seas" is construed to mean without the limits of the State. *Galusha v. Cobleigh*, 18 N. H. 79. And see also *Drew v. Drew*, 27 Me. (2 Heath) 389; *Ward v. Cole*, 82 N. H. 452. And this exception is applicable where the cause of action arises in another State, within which both parties then reside and so continued to reside until after action brought. *Hatch v. Spofford*, 24 Conn. 432. And in Maine, Massachusetts, New Hampshire, Michigan, and Vermont both absence and residence out of the State must concur. *Hall v. Nasmith*, 28 Vt. (2 Wms.) 791; *Bell v. Lamprey*, 52 N. H. 41; *Campbell v. White*, 22 Mich. 178; *Drew v. Drew*, 37 Me. 389; *Langdon v. Doud*, 6 Allen, 423. And that absence must be alleged to be continuing, and not merely from one date to another, since that will be held to be but a single day. *Ibid.* A debtor must be considered "to be absent from and reside out of the State," within the meaning of the exception in the statute of limitations, when his domicile within the State is so broken up, that it would not be competent to serve process upon him by leaving a copy there. And for that purpose there must be some place of abode which his family or his effects exclusively maintain, in his absence, and to which he may be



201. But in Pennsylvania, the term "beyond seas" is construed to mean *without the limits of the United States*, and, therefore, a citizen and resident of South Carolina was held not to be within

expected soon, or in some convenient time to return, so that a copy being left there, and notice in fact proved, the plaintiff may take a valid judgment. *Hackett v. Kendall*, 28 Vt. (8 Washb.) 275. It must be his domicile, which can be in but one place, his home which he had adopted with the intention of remaining, and to which, when absent, he intends to return. *Campbell v. White*, 22 Mich. 178. But where one, a citizen of Connecticut, leaving his family and property behind, goes into another State two successive years, on business, and remains there eight months each year, intending at his departure and during his absence a temporary absence only, and to return to his place of residence, and does actually so return, he was held not to be "without the State," within the meaning of the statute, whereby the time of such absence is to be deducted from the running time of the statute. *Williams, C. J., dissente*. *Gage v. Hawley*, 16 Conn. 106. And see also *Gilman v. Cutts*, 7 Foster (N. H.), 348; *Bucknam v. Thompson*, 88 Me. (8 Heath) 171; *Garth v. Robards*, 20 Mo. (5 Bennett) 823; *Lane v. National Bank*, 6 Kan. 74. The question of residence is one for the jury from the circumstances. *Conrad v. Nall*, 24 Mich. 275; *Ware v. Gowen*, 111 Mass. 526. Absence in California for years, the family of the debtor meanwhile remaining on the homestead in New Hampshire, is to be deducted from the time limited by the statute. *Brown v. Rollins*, 44 N. H. 46. But not a temporary absence or on business. *Pruley v. Waterhouse*, 1 Clarke (Iowa), 498. Even though it be for several consecutive months, the debtor still retaining his domicile. *Colleston v. Hailey*, 6 Gray (Mass.), 517; *Langdon v. Dowd*, 6 Allen (Mass.), 423. Absence in the military service does not prevent the running of the statute, barring criminal proceedings. *Graham v. Commonwealth*, 51 Penn. St. 255. The absence must be such that such service cannot be had as would render a judgment against the defendant valid. *Ward v. Cole*, 32 N. H. 452; *Ward v. Howe*, 88 N. H. 85. In Illinois, the statute ceases to run against a claim while the defendant is out of the State, though only temporarily, and with the intention to return. *Vandlandingham v. Huston*, 4 Gilm. (Ill.) 125. A corporation in another State is not a person beyond the limits of the State, within the meaning of the Arkansas statute (Dig. c. 91, § 18), but is a person within the State, within the meaning of the fourteenth section of that act. *Clarke v. Bank of Miss.*, 5 Eng. (Ark.) 516. In New York, the exception in the statute (2 Rev. Stat. 227, § 27) applies to natural persons only, and not to corporations. *Faulkner v. Del. & Rar. Canal Co.*, 1 Denio (N. Y.), 441. If a person, whose home is permanently established within the State of Maine, during the time, goes out of the State, and there makes a contract, and a cause of action thereon accrues against him before his return home, such contract does not come within the provisions of the 28th section of c. 146, of the Rev. Stat. that "the time of his absence shall not be taken as any part of the time limited for the commencement of the action." *Crehore v. Mason*, 10 Shep. (Me.) 413. The disability of being "beyond sea," under the statute of limitations of Ohio, is removed by death, and the statute commences running against the heirs, on the death of the ancestor, whether the heirs are under disability or not. *Ridley v. Hettman*, 10 Ohio, 522; *Whitney v. Webb*, 10 Ib. 518. And see *Markle v. Burch*, 11 Gratt. (Va.) 26. But where the debtor resides out of the State at the time the cause of action accrues, and never returns, but dies abroad, the statute commences running at the time of granting letters testamentary, or of administration in the State from which he was absent at the time of his death. *Benjamin v. De Groot*, 1 Denio (N. Y.), 151.]



the exception.<sup>1</sup> We have already seen that it has been solemnly decided by the Supreme Court of the United States, that the true construction of the words "beyond seas" is "out of the State." It is, therefore, necessary to advert to the effect of a decision by the highest tribunal in the country, where a State court has adopted a different construction in relation to its own statute, to remove an embarrassment which seems to exist. And here we have recourse to the views of the Supreme Court of the United States, in a case in which the statute of limitations of Tennessee was in question, in relation to its exception in favor of "persons beyond seas;" and where it was said, that the courts of Tennessee had given the same construction to these words as the courts of Pennsylvania. Mr. J. Johnson, who gave the opinion of the court, observed, in relation to this point of the case, as follows: "That the statute laws of the States must furnish the rule of decision to this court, as far as they comport with the Constitution of the United States, in all cases arising within the respective States, is a position that no one doubts. Nor is it questionable, that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious, that this admission may, at times, involve us in seeming inconsistencies; as where States have adopted the same statutes, and their courts differ in the construction. Yet that course is necessarily indicated by the duty imposed on us, to administer as between individuals the laws of the respective States, according to the best lights we possess of what those laws are. This court has uniformly manifested its respect for the adjudications of the State tribunals, and will be very moderate in those claims which may be preferred on the ground of comity. Yet, in a case like the one now occurring, it cannot acknowledge the objection to go further, at present, than to examine the decision formerly rendered, on the construction of these words. We have reflected and heard arguments on our former decision, and not a doubt has been enter-

<sup>1</sup> *Ward v. Hallam*, 2 Dall. (Penn.) 217; s. c. 1 Yeates (Penn.), 329. So of a resident of New York. *Thurston v. Dawes*, 9 Serg. & Rawle (Penn.), 285. [So in Missouri, the term is held to mean, without the limits of the United States. *Marvin v. Bates*, 18 Mo. 217; *Fackler v. Fackler*, 14 Mo. 481; *Keeton v. Keeton*, 20 Ib. 580. And in Michigan, *Darling v. Meacham*, 2 Greene (Iowa), 602. And in the statute of wills of Illinois, *Musson v. Johnson*, 24 Ill. 159.]

tained except on the question, *how far we were bound to surrender an opinion, under the actual state of difference existing between our construction and that of the State from which this cause comes.*" As the case had to go back upon other grounds, the court waived, for the time, a positive decision on the point, trusting that the courts of the State from which the cause came would, in time, furnish such lights upon the fixed local law upon the subject, as would enable the Federal courts to come to a satisfactory conclusion upon the question.<sup>1</sup>

202. A note was discounted at the Branch Bank of the United States, at Richmond, in Virginia; and it arrived at maturity, and was regularly protested for non-payment; an action being brought by the bank against the indorser, to recover the amount of the note, more than five years from the date of the protest, the defendant pleaded the statute of limitations. It was held that the right of action was barred by lapse of time, the plaintiffs not being, in the sense of the saving act, "beyond seas," or out of the country. The contract having been made at Richmond, at their banking-house there, between the president and directors of the Branch Bank and the defendant, the fact of there being an office of discount and deposit of the Bank of the United States at Richmond, and of the residence of the president and directors of the branch being fixed there, must be considered, with reference to the contract in question, as fixing the residence of the corporation itself in Richmond, and not in Philadelphia, the place of the principal bank, so far as the saving of the statute above mentioned applies to the locality of the plaintiff.<sup>2</sup>

203. An action was instituted by the Bank of Alexandria, in the county of Alexandria, against the defendants, residents in the county of Washington, in the same district, for money loaned. The defendants pleaded the statute of limitations of Maryland, which prevails in that part of the District of Columbia, and which limits such actions to three years from the date of the contract. The plaintiff replied, that he was "beyond seas," claiming the benefit of the exception in the statute in favor of persons within that description. The court held that the county of Alexandria,

<sup>1</sup> *Shelby v. Guy*, 11 Wheat. (U. S.) 361. See as to the rule of construction in general of the Federal courts, in questions arising under the statutes of limitation of the respective States, *ante*, Ch. II. § 25.

<sup>2</sup> *Bank of the United States v. M'Kenzie*, 2 Brockenb. (Cir. Co.) 393.

in the District of Columbia, cannot be regarded as standing in the same relation to the county of Washington that the States of the Union stand in relation to each other. The counties of Washington and Alexandria, together constitute the territory of Columbia, and are united under one territorial government. They have been formed by the acts of Congress into one separate political community; and the counties which constitute it resemble different counties in the same State; and do not stand towards one another in the relations of distinct and separate governments. Residents of the county of Alexandria were not "beyond seas," in respect to the county of Washington.<sup>1</sup>

204. The before-mentioned exception is not confined to subjects who may occasionally leave the country, but it is general, and extends to foreigners who are constantly resident abroad. Thus it was adjudged, that the statute of James only begins to run against a plaintiff, a foreigner, from his coming to England. So that if he did not go to that country for many years after the commencement of the cause of action, he will still be entitled to six years, from the time he does go there, to bring his action.<sup>2</sup> And if he never should go to England, he has always a right of action, after six years have elapsed.<sup>3</sup> But if one of several plaintiffs be abroad, and the other in England, the action must be brought within six

<sup>1</sup> *Bank of Alexandria v. Dyer*, 14 Peters (U. S.), 141. [*Lafonde v. Ruddock*, 24 Eng. L. & Eq. 289.]

<sup>2</sup> *Strithorst v. Græme*, 3 Wils. 145; s. c. 2 W. Bla. 728; *Chomqua v. Mason*, 1 Gall. 342; *Ruggles v. Keeler*, 3 Johns. 261; *Hall v. Little*, 14 Mass. 203; *Paine v. Drew*, 44 N. H. 806.

<sup>3</sup> *Chandler v. Villett*, 2 Saund. 121; *Bulger v. Roche*, 11 Pick. (Mass.) 36. [*Von Hemert v. Porter*, 11 Met. (Mass.) 210; *McMillan v. Wood*, 29 Me. (16 Shep.) 217; *Wakefield v. Grant*, 3 Eng. (Ark.) 488; *Ersine v. Messicar*, 27 Mich. 84. But the Arkansas statute of January 14, 1843, placed residents and non-residents of the State on the same footing, and since then mere non-residence does not avoid the statute bar. *Brian v. Tims*, 8 Eng. (Ark.) 597. And where a plaintiff, at and ever since the time when the cause of action accrued, has lived out of the State, the fact that the note upon which suit was brought was executed and delivered to the plaintiff within the State, and has ever since remained within the State, in the hands of his agent, does not bar the plaintiff's right of action. *Wilson v. Keller*, 8 Ib. 509. In Missouri, absence of the plaintiff from the State does not prevent the running of the statute in favor of the defendant, who is an inhabitant of the State. *Smith v. Newby*, 13 Mo. 159. So in Georgia. *Wynn v. Lee*, 5 Ga. 217. And if a debtor comes within the jurisdiction of the State even temporarily, and afterwards departs from and resides without, the running of the statute is suspended. *Whittelsey v. Roberts*, 61 Mo. 120. Absence is not an exception in Indiana. *Jones v. Hays*, 4 M'Lean (U. S.), 521.]

years after the cause of action arises.<sup>1</sup> The act of Maryland, of 1818, repealed the exceptions or savings in former statutes, in favor of persons "beyond seas." The unlimited latitude, it was thought, granted to persons "beyond seas" was considered by the legislature as unreasonable; and it could constitute no actual grievance, or just cause of complaint, if they were reduced to the same standard as the citizens of Maryland. Neither was the repeal a violation of any constitutional obligations of the State; nor was any obligation of contract at all violated or impaired by it.<sup>2</sup> The statute of New Jersey contains no exception in favor of plaintiffs abroad, only in respect to land titles.<sup>3</sup>

205. The received construction in England was, that the exception in the statute of James in respect to persons "beyond seas" extended only to the case where the *creditors* were beyond sea, and not where the *debtors* were, because persons *entitled* to actions are only mentioned. But by the 19th section of the statute, 4 Anne, c. 16th, it is enacted that if any person *against whom* any action lies for seamen's wages, trespass, detinue, trover, replevin, action of account, or upon the case or such other actions as are mentioned in the third section of the statute of James, be beyond sea, at the time that such action accrued, the *plaintiff* shall be at liberty to bring his action against him within the same time after his return, as is limited for such action by the statute of James. Before the statute of Anne, it was in vain attempted upon general reasoning, in many cases, to introduce an exception in favor of the

<sup>1</sup> *Perry v. Jackson*, 4 Durn. & East, 516. [But the absence of one of several joint contractors, beyond seas, against whom there is a cause of action, prevents the running of the statute. *Fannin v. Anderson*, 9 Jur. 969; s. c. 14 L. J. Q. B. 282; *Townes v. Mead*, 29 Eng. L. & Eq. 271. But held otherwise in New Jersey. *Bruce v. Flagg*, 1 Dutch. 219. And in New York, in *Brown v. Delafield*, 1 Denio, 445. But this last case is overruled in *Denny v. Smith et al.*, 18 N. Y. (4 Smith) 567, where it is held that the statute is suspended as to the absent debtor. And see also *Cutler v. Wright*, 22 N. Y. (8 Smith) 472; *Bogart v. Vermilya*, 10 N. Y. (6 Selden) 447. In New York absence from the State suspends the running of the statute, whether it be before or after the cause of action accrues. *Richardson v. Curtis*, 8 Blatch. C. C. 285, affirming *Dorr v. Swartwout*, 1 Blatch. 179.] If one of several joint parties be capable of suing when the cause of action accrues, the statute runs against all. *Jordan v. McKenzie*, 30 Miss. (1 George) 82; *Masters v. Dunn*, Ib. 264; *Parker v. Hull*, 2 Head (Penn.), 641. But *contra*, *Harlan v. Seaton*, 18 B. Mon. (Ky.) 312; *Seay v. Bacon*, 4 Sneed (Tenn.), 99.

<sup>2</sup> *Frey v. Kirk*, 4 Gill & Johns. (Md.) 509.

<sup>3</sup> See Stat. of New Jersey, App. lxix. and *Taberrer v. Brintall*, 2 Harr. (N. J.) 262; *Beardsly v. Southmayd*, 3 Green (N. J.), 171.

plaintiff, in a case where the defendant was out of the realm. A most reasonable exception undoubtedly ; yet, until this statute, such a case in England formed no exception, and the statute of limitations barred the action ; and the exception, it seems, does not extend to defendants in Pennsylvania.<sup>1</sup> The acts of limitation of Maryland, of 1715 and 1765, are, by judicial construction, to be taken together, and to receive an interpretation to carry into effect the plain and obvious intent of the legislature, which was, that the limitations should not attach against a creditor, where the debtor was absent from the State at the time of cause of action accrued.<sup>2</sup> Where, therefore, the plaintiff and defendant are both beyond sea, at the time the cause of action accrues, and both return after the cause of action accrues, the statute will begin to run when both have returned, though both be not within the jurisdiction at the same time ; for the impediment may be removed as to the one while it remains as to the other ; and, after it has been removed as to both, the time limited for bringing the action commences.<sup>3</sup>

206. The word *return*, as applied to an absent debtor, it has been held, applies as well to persons coming from abroad, as to citizens of the country going abroad for a temporary purpose, and then returning.<sup>4</sup> But the coming from abroad must not be *clandestine*, and with an intent to defraud the creditor, by setting the statute in operation, and then departing. It must be so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, of arresting the debtor.<sup>5</sup> It was said, in a case in Massachusetts, that a person must return with *a design to dwell* within the jurisdiction of the Commonwealth ; but that was not the point before the court ;<sup>6</sup> and the court, in a subsequent case, considered, that such a return as

<sup>1</sup> *Nathans v. Bingham*, 1 Miles (Penn.), 164.

<sup>2</sup> *Hysinger v. Bultzell*, 8 Gill & Johns. (Md.) 158.

<sup>3</sup> *Vans v. Higginson*, 10 Mass. 29.

<sup>4</sup> *Ruggles v. Keeler*, 8 Johns. (N. Y.) 287 ; *Bulger v. Roche*, 11 Pick. (Mass.) 38. [*Crocker v. Arey*, 8 R. I. 178 ; *State Bank v. Seawell*, 18 Ala. 616 ; *Palmer v. Shaw*, 16 Cal. 93. The exception applies where the debtor leaves the State with the purpose of never returning. *Ayres v. Henderson*, 9 Texas, 539. If a party plaintiff residing out of the State commences an action within the State, it is a constructive return, and the statute begins to run. *Yoast v. Willis*, 9 Ind. 549. And the statute begins to run, although the debtor be a citizen of one State, and is taken into another on a criminal warrant and imprisoned, and continues to run while the debtor remains in the latter State. *Turner v. Shearer*, 6 Gray (Mass.), 427.]

<sup>5</sup> *Fowler v. Hunt*, 10 Johns. (N. Y.) 464.

<sup>6</sup> *White v. Bailey*, 8 Mass. 278.

would give a party a reasonable opportunity to commence his action was sufficient.<sup>1</sup> A return even for a *temporary* purpose will do away with the exception of absence;<sup>2</sup> if not a secret, concealed, or clandestine presence, of which the creditor can take no advantage. His presence must be so public and under such circumstances as the creditor may, by ordinary diligence, make an arrest.<sup>3</sup>

207. Now, in Massachusetts, in order to avoid the exception in the statute of Massachusetts, of being out of the Commonwealth, the defendant is bound to show, that the creditor knew of his coming into the Commonwealth, or *having attachable property* therein, so as to have had an opportunity to arrest him, or make an attachment, or that his returning or having property was so public as to amount to constructive notice or knowledge, and to raise the presumption that, if the creditor had used ordinary diligence, the defendant might have been arrested or his property

<sup>1</sup> *Byrne v. Crowninshield*, 1 Pick. (Mass.) 263.

<sup>2</sup> *Faw v. Roberdeau*, 3 Cranch (U. S.), 174.

<sup>3</sup> *Hysinger v. Bultzell*, 8 Gill & Johns. (Md.) 158; *Hill v. Bellows*, 15 Vt. 727. [*Didier v. Davidson*, 2 Sandf. (N. Y.) Ch. 61; *Dorr v. Swartwout*, 1 Blatch. (U. S.) 179; *Ford v. Babcock*, 2 Sandf. (N. Y.) Sup. Ct. 518; *Cole v. Jessup*, 2 Barb. (N. Y.) Sup. Ct. 309; *Didier v. Davidson*, 2 Barb. (N. Y.) Ch. 477. Where the defendant was in the State two or three days on business, and was publicly about in the principal streets, and transacted business at a store directly opposite the plaintiff's, this was held a sufficient return to set the statute in motion. *Randall v. Wilkins*, 4 Denio (N. Y.), 577. In Vermont, where both parties reside out of the State, and the claim is barred by the statute of the State in which they both reside, if the defendant be temporarily within the State, it is a return, and the plaintiff may sue. *Graves v. Weeks*, 19 Vt. (4 Wash.) 178. But see *Hale v. Lawrence*, 1 N. J. 714, where it was held (McCarter, J., *dissentiente*) that the action would not lie, having been barred by the statute of the State where it accrued. Where the debtor, at the time the cause of action accrued, was residing out of the State, proof that since then he had often been a few miles within the limits of the State, on business, with personal property which might have been attached, without any proof that the plaintiff had knowledge of it, does not show a return, wherefrom the statute will commence running. *Crosby v. Wyatt*, 10 Shep. (Me.) 156. But, in Alabama, it is held that the debtor must have resided six years in the State since his return, in order that he may avail himself of the exceptions in the statute; and, if there have been repeated absences, six years since the first return, deducting the time of the absences. *Smith v. Bond*, 8 Ala. 386. So in Illinois. *Chenot v. Lefevre*, 3 Gilm. (Ill.) 637. And in New York, *Burroughs v. Bloomer*, 5 Denio (N. Y.), 582; *Ford v. Babcock*, 2 Sandf. (N. Y.) Sup. Ct. 518. But see *contra*, *Dorr v. Swartwout*, *ubi sup.*; *Richardson v. Curtis*, 3 Blatch. C. C. 385; *Berrien v. Wright*, 26 Barb. (N. Y.) 208; *Harden v. Palmer*, 2 E. D. Smith (N. Y.), 172; *Campbell v. White*, 22 Mich. 178. In Maine, the disability to sue, arising from absence from the United States, is removed by a return to any one of the States. *Varney v. Groves*, 37 Me. 306.]



attached.<sup>1</sup> Under the Revised Statutes of that State, if a new promise is made by a debtor when out of the Commonwealth, and he does not leave property therein, which can be attached by the ordinary process of law, the statute will not begin to run upon the new promise until after his return into the Commonwealth.<sup>2</sup> And the provision in the statute, that where the debtor, at the time when the cause of action accrued, was out of the Commonwealth, and did not *leave* attachable property therein, the statute will not begin to run until his *return*, applies to persons who have never been in the Commonwealth, as well as to citizens who have been absent for a time.<sup>3</sup>

<sup>1</sup> *Little v. Blunt*, 16 Pick. (Mass.) 859.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* [As the law now stands, Gen. Stat. c. 155, § 9, a citizen of another State must reside in Massachusetts in all six years after his return or coming into the State in order to avail himself of the statute. *Milton v. Babson*, 6 Allen (Mass.), 322. But in Mississippi, where the statute is set in motion by the first return, it runs without deduction for subsequent absences. *Ingraham v. Bowie*, 88 Miss. (4 George) 17.] If a debtor, absent from the State, would avail himself of the statute on the ground of his having, in the State, property subject to attachment, it is incumbent on him to show this fact; and it is not sufficient to show that he has deeds of land on record, without showing a title in himself. *Hill v. Bellows*, 15 Vt. 727. [The defendant's ownership of the property must be notorious to such an extent that it would not escape a reasonable search and inquiry on the part of the plaintiff. *Wheeler v. Brewer*, 26 Vt. (5 Washb.) 113. The provision in the Revised Statutes of Massachusetts, c. 120, § 9, that the time of a party's absence and residence out of the State shall not be taken as any part of the time limited for the commencement of the action against him, does not apply to a case in which the action was barred by the statute of limitations that was in force before the Revised Statutes went into operation. *Wright v. Oakley*, 5 Met. (Mass.) 410. But if the right of action was not then barred, it does apply. *Darling v. Wells*, 1 Cush. (Mass.) 508; *Moor v. Bates*, *Ib.*; *Willard v. Clarke*, 7 Met. (Mass.) 485; *Brigham v. Bigelow*, 12 *Ib.* 268; *Seymour v. Deming*, 9 Cush. (Mass.) 527. In New Hampshire, the statute of limitations is no bar to an action where the defendant has resided without the State, unless he has had attachable property within the State during the full uninterrupted term of six years. *Dow v. Sayward*, 14 N. H. 9. In Missouri it has been held that the concealment which prevents the running of the statute need not be fraudulent, but that a change of residence several times by the debtor without informing his creditor is a concealment within the meaning of the statute. *Harper v. Pope*, 9 Mo. 402. A debtor, who has been absent more than the period of statutory limitation, may, in an action against him on his return, avail himself of a set-off. *Hewlett v. Hewlett*, 4 Edw. (N. Y.) Ch. 7.]



## CHAPTER XX.

## NEW PROMISES AND ACKNOWLEDGMENTS.

208. It is a construction of law agreeable to the true notions of equity, that if a debtor should discharge a just demand against him after the proper remedies for the recovery of it have been barred by the statute of limitations, he cannot recover back the money, on the ground that the payment of it was without consideration.<sup>1</sup> The plain reason is, that there is a consideration of the highest kind, a consideration consisting of the moral obligation every debtor is under to pay his creditor. So, if a person make a promise that he will pay a debt he justly owes, for the recovery of which all legal and equitable remedies are barred by the statute, such promise renders him liable to an action, the promise being founded upon the same legal consideration of an obligation existing *in foro conscientiae*.<sup>2</sup> The promise may be either express, or it may be constructive. It is constructive, by a simple *acknowledgment* of the justice of the debt in question, so made as to amount in the eye of the law to an *implied* promise.<sup>3</sup> It is true, there have been many instances in which it has been held, that the revival of a debt by an acknowledgment of its justice and continued existence has been put upon the ground of its repelling a *presumption of payment*, the debt being fallaciously presumed to be extinguished when the time limited by the statute has elapsed. It is our purpose to show, that this doctrine is now an exploded one, and that

<sup>1</sup> Evans's Pothier, 414; and *ante*, § 7.

<sup>2</sup> See *Le Roy v. Crowninshield*, 2 Mason (Cir. Co.), 151.

<sup>3</sup> "The doctrine," says Mr. Justice Story, "proceeds upon the ground, not of a strict *legal* right in the creditor, which he may enforce against the will of the debtor, but upon the notion that there still exists, notwithstanding the statutable prescription, a moral obligation binding *in foro conscientiae*, which, if recognized by the debtor, repels any imputation that the transaction is *nudum pactum*, without any consideration." *Le Roy v. Crowninshield*, *supra*. [But, it seems, a person incapable of binding himself by an original promise cannot revive a debt by a new promise. Thus, one who has been found, on inquisition, an habitual drunkard, cannot revive a debt by a new promise. *Hannum's Appeal*, 9 Barr (Penn.), 471. But a new promise by an infant, for necessities, revives the debt. *Williams v. Smith*, 28 Eng. L. & Eq. 276.]

the construction first stated has gradually become fully established by the concurrent authority of courts of justice as the only one consistent with the acknowledged rules of law and equity, and with the real and legitimate object of the statute of limitations. To render this unquestionable, which of course is highly desirable, demands an attentive review of the authorities;<sup>1</sup> and this is the business of the present chapter.

209. The words of the statute of James are express, that all actions on the case, &c., "shall be commenced and sued within six years next after the cause of such actions, or suits, and not after." In every form of action but that of assumpsit the construction has been in unison with the words and policy of the law. Thus, where the gist of the action is an injury committed, if the right of action is once barred, it is impossible to revive it by any admission, however unequivocal and positive; and it may be considered as an unvarying rule, in the case of *torts*, that no acknowledgment will reserve it from the express language of the statute.<sup>2</sup> In the action of assumpsit, however, it is otherwise, and certain admissions of the debt within six years have been adjudged to take the case out of the statute; such admissions being considered as equivalent to *new promises* made on the meritorious consideration of the antecedent liability, and therefore affording a new and distinct cause of action.<sup>3</sup> Hence, the issue joined when the statute is pleaded to a debt of longer standing than the time limited is upon the *promise* within six years; and hence, whatever amounts to evidence of such a promise, in fact, is sufficient to support the affirmative of the issue. If a simple acknowledgment of the debt as then existing is proved, a promise to pay it may fairly be presumed from the reason and justice of the case, and the probable intention of the party making it. But if the acknowledgment is accompanied by an express declaration of the party, that he does

<sup>1</sup> For a reference to many of the latest American authorities, the author acknowledges his indebtedness to Mr. Joyne's Essay on the Act of Limitations of Virginia, &c., — a work of great ability and research, and one which successfully maintains the proposition here proposed to be established.

<sup>2</sup> *Hurst v. Parker*, 1 Barn. & Ald. 92; *Tanner v. Smart*, 6 Barn. & Cres. 608, and 13 Eng. Com. Law, 278. [*Post*, § 284.]

<sup>3</sup> *Bryan v. Horseman*, 4 East, 899, where Mr. Bosanquet puts it on the ground of a new promise. And the same ground is taken expressly by the court in *Ward v. Hunter*, 6 Taunt. 210; *Pittam v. Foster*, 1 Barn. & Cres. 248; and in the Supreme Court of the United States, in *Bell v. Morrison*, 1 Peters, 351.

not intend to pay, and that he cannot be compelled to pay by law, the presumption of a promise, it is plain, is completely rebutted. So great, however, has been the latitude of construction, in the courts of Great Britain, and formerly in some cases in this country, that the slightest and most ambiguous expressions have been allowed to revive an old and extinguished debt; and cases have occurred, in which a person by mentioning in conversation that he had formerly contracted a debt, but *should not pay it*, as it was above six years' standing, has deprived himself of that right upon which he meant to insist. There is, perhaps, no other subject, which has caused more litigation, and upon which the cases have been more conflicting. It can be of but little service, and would be but irksome to the reader, to cite every particular case which has grown out of this prolific source of legal controversy in England, as many of them are so very deservedly subject to the imputation of being vacillating and unsatisfactory; and, as has been declared, "present distinctions more nice than wise."<sup>1</sup> It is worthy of remark, however, that, in the first attempts to revive a debt which had been barred by virtue of a subsequent promise, it was held that nothing less than an *express* promise would have that effect, and that no implied promise could be drawn from a bare acknowledgment. It was expressly so held, in *Dickson v. Thompson*,<sup>2</sup> in which it was ruled by Scroggs, Ch. J., and agreed to by all the counsel, that a promise of payment within six years, though the debt was contracted long before, will evade the statute of limitations, but confession, or *only an acknowledgment* that he owed the plaintiff so much, would not do it. Again, in *Andrews v. Brown*,<sup>3</sup> it was held, that a promise to pay was indispensable, and that a bare acknowledgment was not a promise. And again, in *Williams v. Gun*,<sup>4</sup> Lord Chief Justice Parker held, that a bare acknowledgment of the debt was insufficient, and that the plaintiff could only recover as much of the demand as the plaintiff had promised he would pay. The opinion of Chief Justice Pollexfen, as given in *Bland v. Haselrig*,<sup>5</sup> went still further, it being that a new consideration was requisite to make the new promise available.

210. At a later period, it was held, that an acknowledgment was *evidence* of a promise to go to the jury, and Rokeby, J., compared

<sup>1</sup> Mellen, Ch. J. in *Perley v. Little*, 3 Greenl. (Me.) 97.

<sup>2</sup> *Dickson v. Thompson*, 2 Shower, 126.

<sup>4</sup> *Williams v. Gun*, Fortesc. 117.

<sup>3</sup> *Andrews v. Brown*, Prec. Ch. 885.

<sup>5</sup> *Bland v. Haselrig*, 2 Ventris, 152.

it to the case of trover and conversion, in which a demand and refusal are held to be evidence of a conversion, though in themselves they amount not to a conversion.<sup>1</sup> Lord Mansfield afterwards assumed a still greater latitude, and laid down that the *slightest* acknowledgment had been held to take a demand out of the statute, such as, "Prove your debt and I will pay you," or, "I am ready to account, but nothing is due you."<sup>2</sup> The second instance put is, as has been said, more of a denial than an acknowledgment.<sup>3</sup> In another case,<sup>4</sup> said his lordship, the debtor may either take advantage of the statute of limitations, if the debt be older than the time limited for bringing the action; or he may waive this advantage; and in honesty he ought not to defend himself by such a plea. And the slightest word of acknowledgment will take it out of the statute." Numerous decisions followed, founded upon these views of Lord Mansfield; but, as they have all been entirely overruled by later decisions, and as an entirely different rule has since prevailed, it would be unprofitable to cite them. We will just notice one of the decisions, however, founded upon Lord Mansfield's construction, on account of the high authority of the judge who gave his opinion therein, and his reason for it. In the case of *Bryan v. Horseman*,<sup>5</sup> Lord Ellenborough held certain expressions of the defendant to be a sufficient acknowledgment, though if the matter had been *res integra* it *might have admitted of doubt*. And on a rule granted for a new trial, it was said by Lord Ellenborough, that, whatever might have been the opinion of the court upon the statute, had the question been *new*, yet, after the long train of decisions upon the subject, they were bound to hold, that what was said by the defendant was a sufficient acknowledgment of the pre-existing debt to create an *assumpsit*, so as to take the cause out of the statute. This, to say the least of it, is a strong intimation that Lord Ellenborough took a different view of the statute from Lord Mansfield.

211. At length the English judges and lawyers at the bar were decided and united in an expression of the opinion that justice

<sup>1</sup> *Heyling v. Hastings*, 1 Lord Raym. 421; Carth. 470; 5 Mod. 426. See also opinion of Lord Holt, in *Green v. Crane*, 2 Ib. 1101, and of Lord Hardwicke, in *Lacon v. Briggs*, 2 Atk. 105.

<sup>2</sup> *Trueman v. Fenton*, Cowp. 548.

<sup>3</sup> So declared by the learned counsel, in *Bryan v. Horseman*, 4 East, 599.

<sup>4</sup> *Quantock v. England*, 5 Burr. 2628. See *Yea v. Fouraker*, 2 Burr. 1099.

<sup>5</sup> *Bryan v. Horseman*, 4 East, 599.

demanded, as soon as could consistently be done by the bench, a restoration of the statute of limitations from the unfortunately equitable construction which had been put upon it in that country, and which had amounted almost to a repeal.<sup>1</sup> "I agree," says Gibbs, Ch. J., in *Hellings v. Shaw*,<sup>2</sup> "that if the courts could retrace their steps, and could see all the consequences that have arisen, they would have seen it better to adhere to the precise words of the statute, than to attempt to relieve in particular cases." Dallas, J., also observed, "that the late cases had tended much to correct the latitude of the former cases, and that *most wisely*." This agrees with what Mr. Sergeant Williams observes, that it might, perhaps, have been as well if the letter of the statute had been strictly adhered to. It is an extremely beneficial law, he continues, on which, as has been observed, the security of all men depends, and is, therefore, to be favored. And although it will prevent a man now and then recovering an honest debt, yet it is his own fault that he has postponed his action. Besides which, to permit evidence of promises and acknowledgment, seems to be a dangerous inlet to perjury.<sup>3</sup> Lord Eldon, in *Baille v. Sibbald*,<sup>4</sup> declared that the statute had been construed with a view to defeat, not to promote, its object, and that the established construction was against its true principles. But in the case before him he yielded to the authorities.

But it was not until the case of *A'Court v. Cross*, in the Court of Common Pleas,<sup>5</sup> that the statute was brought nearer back to its earlier construction. The defendant, in this case, upon being arrested, said, "I know that I owe the money, but the bill I gave was on a three-penny receipt stamp, and *I will never pay it*," which the court held, was not such an acknowledgment as would revive the debt, against the plea of the statute. Mr. Chief Justice Best, who delivered the opinion of the court, after commenting upon former decisions, said: "I think if I were now sitting in the Ex-

<sup>1</sup> See the following cases: *Bradshaw v. Cogan*, 3 Esp. (N. P.) Cases, 157; *Coltman v. Marsh*, 3 Taunt. 380; *Swann v. Sewell*, 2 Barn. & Ald. 759; *Rowcroft v. Lomas*, 4 Maul. & Sel. 457; *Mucklow v. St. George*, 4 Taunt. 618; *Miller v. Caldwell*, 3 Dow. & R. 267; *Knott v. Farren*, 4 Ib. 179; *De La Torre v. Barclay*, 1 Stark, 7.

<sup>2</sup> 7 Taunt. 608.

<sup>3</sup> *Vid.* Evans's Pothier, App. 110, n. Mr. Bosanquet, in *Bryan v. Horseman* (4 East, 399), insists upon the necessity of a *new promise*.

<sup>4</sup> *Baille v. Sibbald*, 15 Ves. 185.

<sup>5</sup> *A'Court v. Cross*, 3 Bing. 329.

chequer Chamber, I should say, that an acknowledgment of a debt, however distinct and unqualified, would not take from the party who makes it the protection of the statute of limitations. But I should not, after the cases that have been decided, be disposed to go so far in this court, without consulting the judges of the other courts." But he thought "there were many cases, from which it may be collected, that if there be any thing said, at the time of the acknowledgment, to *repel the inference of a promise*, the acknowledgment will not take the case out of the statute of limitations." The same judge, on a subsequent occasion, said, that as regarded every word he was reported to have uttered in the case last referred to, with all the consideration he had given to the matter, he was still of opinion that he was warranted by prior decisions.<sup>1</sup> Lord Chief Justice Tenterden, in the case of *Tanner v. Smart*, expresses the same views, and maintains that the acknowledgment must be positive, distinct, and unqualified.<sup>2</sup> According to Lord Chancellor Brougham, the act which revives the debt "is what essentially

<sup>1</sup> *Scales v. Jacobs*, 3 Bing. 688.

<sup>2</sup> *Tanner v. Smart*, 6 Barn. & Cres. 608. The reader may be gratified by a perusal of the opinions of the court in the following cases, which are in confirmation of the rule as just stated in the text: *Ayton v. Bolt*, 4 Bing. 105; *McCulloch v. Dawes*, 9 Dowl. & R. 40; *Linsell v. Bonsor*, 2 Bing. (N. C.) 241; *Gould v. Shirley*, 2 Moore & Payne, 581; *Edmunds v. Downer*, 2 C. & Mees. 459; *Haydon v. Williams*, 7 Bing. 163; *Pierce v. Brewster*, 12 Moore, 515; *Brigstock v. Smith* (a very strong case in point in the Court of Exchequer), 4 Tyrwh. Ex. 445; *Spong v. Wright*, 9 Mees. & Welsb. Ex. (Vict.) 629; *Morrall v. Frith*, 8 Car. & Payne, 246; *Dickinson v. Hatfield*, 5 Ib. 46. [*Cawley v. Farwell*, 6 Eng. L. & Eq. 397; *Foster v. Dunbar*, Ib. 496; *Yates v. Gardner*, 5 Ib. 541; *Gardner v. McMahon*, 2 G. & D. 593; *Cripps v. Davis*, 12 Mees. & Welsb. 159; *Hart v. Prendergast*, 14 Ib. 741; *Smith v. Thorn*, 10 Eng. L. & Eq. 391; *Rackham v. Marriott*, 37 Ib. 460; *Collis v. Stack*, 38 Ib. 487. But in *Edmonds v. Goater* (9 Ib. 208), the Master of the Rolls said: "In this case the creditor caused a letter to be written to the debtor requiring payment of the debt or further security, and received an answer from the debtor, saying, in effect, 'I shall soon be in Hampshire, when, I trust, every thing will be arranged agreeable to the wishes of his creditor;'" and held this a sufficient promise,—an apparent relaxation of the stringency of the modern rule. And see also *Comforth v. Smithard*, 5 Hurl. & Nor. 18; *Cockill v. Sparkes*, 1 Hurl. & Colt. 699, is more in accordance with the spirit of the decisions prior to *Edmonds v. Goater*. "I have received a letter from P. & L. requesting me to pay your account. I have no wish to have any thing to do with the lawyers; much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled in 1851; but, as you declare it was not settled, I am willing to pay you £10 per annum until it is liquidated. Should this proposal meet your approbation, we can make arrangements accordingly." Held insufficient. *Buckmaster v. Russell*, 10 C. B. (N. Y.) 745; *Collinson v. Margesson*, 3 Hurl. & Nor. 954.]



constitutes its new being, and is inseparable from it. It stands not by its original force, but by the *new promise* which imparts vitality to it. Proof of the latter is indispensable to raise the assumpsit on which an action can be maintained. It was this view of the matter which first created the doubt, whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone.”<sup>1</sup> Before these late overruling authorities, it was maintained by the able editor of Pothier on Obligations (in reference to the opinion of Lord Ellenborough, in *Bryan v. Horseman*, before cited), that though there may be reason in adhering to a series of erroneous judgments, rather than to disturb titles to real property held under their sanction, yet where there would be no inconvenience beyond the immediate case, where the general consequences would be wholly prospective, courts of justice have as much authority to restore the law as they before had to subvert it; and that a correct principle of law is an authority entitled to higher respect than an erroneous set of precedents.<sup>2</sup>

212. The tribunals of our own country have been in advance of those of England, in having acted in accordance with the views expressed by the learned annotator above referred to. In the Supreme Court of the United States, in the year 1814, it was declared, by Chief Justice Marshall, that the decisions with respect to the acknowledgment of a debt had gone full as far as they ought to be carried; and that that court was not inclined to extend them, the statute of limitations being entitled to the same respect as other statutes and should not be explained away.<sup>3</sup> In this case, one partner, who was sued, said, “the account was due, and that he supposed it had been paid, but had not paid it himself, and did not know of its being ever paid.” These words were not considered a sufficient admission from which to infer a promise. “It is not sufficient,” said the learned judge, “to take the case out of the act, that the claim should be proved, or be acknowl-

<sup>1</sup> 1 Russ. & Mylne, Ch. 255, as cited in Joynes, *supra*, 119.

<sup>2</sup> See Evans's Pothier, App. 109, note.

<sup>3</sup> *Clementson v. Williams*, 8 Cranch (U. S.), 72. Mr. Justice Washington, many years since, in the Circuit Court of the United States, in *Read v. Wilkinson* (2 Wash. Cir. Co. 514), charged the jury, that “any thing which is added, tending to negative a promise, must be considered as qualifying every other expression; and, as the whole must be taken together, it amounts to a refusal to pay, which can never be construed into a promise to pay.”



edged to have been originally just; the acknowledgment must go to the fact that it is still due.”<sup>1</sup>

The subject came before the Supreme Court of the United States, at the January term, 1828, in the case of *Bell v. Morrison*,<sup>2</sup> which has ever since been regarded as a leading case, the decision coming from high authority, and the opinion accompanying it being positive, and too lucid and conclusive to be questioned. Mr. Justice Story, who gave the opinion of the court, commenced by observing, in relation to the plea of the statute, that it had been matter of regret in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that the statute, instead of being viewed in an unfavorable light, as an unjust and discreditable defence, it had received such support as would have made it what it was intended to be, emphatically a statute of repose. It was a wise, he said, and a beneficial law, *not designed merely to raise a presumption of payment* of a just debt from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or the removal of witnesses. It had a manifest tendency, he thought, to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. His opinion was, that the English decisions upon the subject had gone great lengths, — greater than, in the judgment of the court, any sound interpretation of the statute would warrant, and, in some instances, to an extent which was irreconcilable with any just principles. He acknowledged that there had been a disposition on the part of the English courts, to retrace their steps, and to bring back the doctrine to sober and rational limits; and that the American courts had evinced a like disposition. He adhered to the rule that the acknowledgment must show, positively, that the debt is due, either wholly or in part, and must be unqualified. If the bar, he said, is sought to be removed by a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate. And if there be no express promise, and a

<sup>1</sup> And see *Wetzell v. Bussard*, 11 Wheat. (U. S.) 309.

<sup>2</sup> *Bell v. Morrison*, 1 Peters (U. S.), 351.

promise is to be raised by implication of law, from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable and *willing* to pay. On the contrary, he held if there be accompanying circumstances which repel the presumption of a promise or intention to pay,—if the expression be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways,—he thought they ought not to go to a jury as evidence of a new promise to revive the cause of action. And he declared his opinion expressly, that any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries. And it was far from being certain, he said, that, if the early interpretation of the statute had been adhered to, namely, that nothing but an express promise should take a case out of the statute, it would not have generally been in promotion of justice. These views were recognized as sound, and the authority of the case was confirmed, in the subsequent case, in the same court, of *Moore v. Bank of Columbia*.<sup>1</sup>

213. The number of occasions upon which this subject has, at different times within the last half-century, been presented for the consideration and judgment of the judicial tribunals of Pennsylvania, is remarkable; and the decisions consequent to the attention given it, by the judges in that State, are alike distinguished for consistency with each other and an accordance with the now prevailing construction.<sup>2</sup> In *Murray v. Tilley*, at Nisi Prius, in 1811, where a defendant said, on demand of payment being made, that, if the note had been presented to him in time, he would have paid

<sup>1</sup> *Moore v. Bank of Columbia*, 6 Peters (U. S.), 86. Opinion by Thompson, J.

<sup>2</sup> *Smith v. Frell*, Add. (Penn.) 291; *Cowan v. Maguagan*, Wallace, 66; *Bell v. M'Call*, 1 Brown, 128; *Hudson v. Carey*, 11 Serg. & Rawle, 18; *Bailey v. Bailey*, 14 Ib. 197; *Brown v. Campbell*, 1 Ib. 176; *Miles v. Moodie*, 3 Ib. 211; *Scull v. Wallace*, 15 Ib. 231; *Bailey v. Bailey*, 14 Ib. 195; *Eckart v. Wilson*, 12 Ib. 398; *Patton's Adm'r v. Ash*, 7 Ib. 116; *Gallagher v. Milligan*, 8 Penn. 177; *Fries v. Boisselin*, 9 Serg. & Rawle, 128; *Guier v. Pearce*, 2 Browne, 85; *Jones v. Moore*, 5 Binn. 578; *Man v. Warner*, 4 Whart. 479; *Church v. Feterow*, 2 Penn. 801; *Brown v. Bridges*, 2 Miles, 424; *Gleim v. Rise*, 6 Watts, 44; *Berghaus v. Calhoun*, 6 Watts, 219; *Gylkyson v. Larue*, 6 Watts & S. 218; *Thompson v. Hopper*, 1 Ib. 468; *Hay v. Kramer*, 2 Ib. 187; *Haydock v. Tracy*, 3 Ib. 507; *Alison v. James*, 9 Ib. 280; *Magee v. Magee*, 10 Watts, 172.

it, but that he knew the statute of limitations would now bar the claim, and he would not pay it, it was ruled, that a *new promise* ought not to be inferred.<sup>1</sup> In the District Court for the city and county of Philadelphia, in the same year, the demand of the plaintiff was for goods sold; and, to a plea of the statute, he replied a new promise within six years. The evidence was that the defendant, after the expiration of six years, acknowledged the receipt of the goods, but said, "he thought he had paid for them, and should rely on the statute." Per Curiam: "After an action has been barred by the statute of limitations, a *promise* has been deemed sufficient to revive it. An acknowledgment, a very slight acknowledgment, may be considered *evidence* of a promise, but then it must be such an acknowledgment as is consistent with a *promise* to pay; for the promise is implied from the acknowledgment. The defendant said that he had received the goods, but thought he had paid for them, and would rely on the statute. How is it possible from this to *imply a promise to pay*? He had a right to rely on the statute; and, although its provisions may sometimes bear hard upon individuals, we feel ourselves bound by the law of the land, as expressed by the legislature, in opposition to which no man has a right to set up his own private opinion." *Jones v. Moore*, decided by the Supreme Court of Pennsylvania in 1813,<sup>2</sup> has been regarded as a return, in that State, to the doctrine that the statute was *an act of the legislature*, and, *as such*, ought to be carried fully into effect.<sup>3</sup> The views expressed by Chief Justice Tilghman in this case are clearly expressive of the law as it is now generally understood to be. He says: "If six years elapse after the cause of action accrued, there can be no recovery, although the debt is *not extinguished*. It remains due in *conscience*, and is a good consideration for a new promise. It remains in some respects due in *law*, too; for, if the defendant omits to plead the act of assembly, he is considered as having waived the benefit of it, and the plaintiff may recover against him. The letters of the defendant are said to contain an *acknowledgment* of the debt, which, as the plaintiff's counsel contends, is sufficient, *per se*, to take the case out of the statute, not because it is evidence of a new promise, but because it *revives* the debt."<sup>4</sup> There is some confusion, and

<sup>1</sup> *Murray v. Tilley*, stated by the court in *Fries v. Boisselin*, 9 Serg. & Rawle, 128.

<sup>2</sup> *Guier v. Pearce*, 2 Browne, 85.

<sup>3</sup> *Jones v. Moore*, 5 Binn. 573.

<sup>4</sup> Per Huston, J., in *Man v. Warner*, 4 Whart. 479.

perhaps some inconsistency, in the cases on this subject; *but it appears to me, from the reason of the thing, and from a review of all the cases, that an acknowledgment of the debt can only be considered as evidence of a new promise, or, what is pretty much the same thing in substance, as a circumstance from which the law will imply a new promise.* To consider this matter on principle, when the defendant pleads *non assumpsit infra sex annos*, and the plaintiff replies *assumpsit infra sex annos*, how can the issue be found for the plaintiff without proof of a promise, express or implied, within six years? It is the very point and the only point in issue. I cannot comprehend the meaning of reviving the old debt, in any other manner than by a new promise." Yeates, J., observed: "My judgment is not yet prepared to go to the extent of some of the cases decided on this subject. We are told in the books that an acknowledgment of a debt is only evidence of a promise to pay it. Where it is accompanied by circumstances, or declarations that the party means to insist on the benefit of the statute, no promise to pay can possibly be implied without violating the truth of the case." The views expressed by these two learned judges lie at the foundation of the modern decisions to which we have referred in England, and of those of the Supreme Court of the United States. In *Fries v. Boisselin*,<sup>1</sup> the defendant's words were wholly *inconsistent with a promise to pay*.

The above construction has ever been tenaciously maintained in Pennsylvania, and has been, if possible, more clearly defined and illustrated. In giving the opinion of the court, in *Gleim v. Rise*, in the Supreme Court of Pennsylvania,<sup>2</sup> Huston, J., in reference to the loose construction at one time given to the statute in respect to acknowledgments, observed, that, some twenty years ago, that court began to retrace its steps; and that its latest decisions say, that, in order to take a case out of the operation of the statute, it must be proved that the defendant admitted the debt to be still due; and that if any declaration be made by the party, at the time, inconsistent with a promise to pay, the court is bound to instruct the jury that there is not sufficient evidence from which to infer a new promise. By Chief Justice Gibson, in giving the opinion of the Supreme Court of Pennsylvania, in *Berghaus v. Calhoun*,<sup>3</sup> the

<sup>1</sup> *Fries v. Boisselin*, 9 Serg. & Rawle, 128.

<sup>2</sup> *Gleim v. Rise*, 6 Watts (Penn.), 44. Cases cited, *Gallagher v. Milligan*, 8 Penn. 179; *Church v. Feterow*, 2 Ib. 801.

<sup>3</sup> *Berghaus v. Calhoun*, 6 Watts (Penn.), 219.

doctrine of acknowledgment, as understood by this court, is thus laid down: "An acknowledgment of indebtedness, though not itself a promise, is held to be evidence of it. In this we see a remnant of that judicial repugnance to the statute of limitations, which had at one time nearly abolished it. It follows neither necessarily nor naturally that the acknowledged existence of a debt, barred only so far as regards the means of its enforcement, implies a promise to pay it; and an express promise it is not pretended to be. It is but the connection of a fact, which the plaintiff might prove as effectively by any other evidence; for it is a postulate of the doctrine that the statute, which takes away the remedy, leaves the existence of the duty untouched. Were the fact of indebtedness, therefore, the efficient cause of the promise, the statute would be a dead letter; for the plaintiff would make out a case to recover in consistence with it, by making out his original demand. But a naked duty, or moral obligation, though a sufficient consideration for an express promise, raises no presumption by implication of law; consequently, though we might accurately suppose the recognition of a debt to be evidence of consideration, we might not, agreeably to admitted analogies, suppose it to be evidence of a promise, because it is equally consistent with a declared determination not to pay. It is established, however, by decisions we dare not shake, that it may, by legal intendment, be evidence of a promise; yet to avoid the uncertainty and insensible encroachment on the statute that would ensue, did we attempt to shape our course by the lights and shadows of former precedents, we may require the acknowledgment of the demand, as a debt of legal obligation, to be *so distinct* and *palpable*, in its extent and form, as to preclude hesitation." These late cases in Pennsylvania are supported by other late cases;<sup>1</sup> and, in still later cases, the language of the court is, that "the acknowledgment of a debt ought to be plain, unambiguous, express, and so distinct and palpable in its extent, as to preclude hesitation."<sup>2</sup>

214. In the State of New York, in the Supreme Court, in 1809,

<sup>1</sup> See *Magee v. Magee*, 10 Watts (Penn.), 172; *Hogan v. Bear*, 5 Ib. 41; *Thompson v. Hopper*, 1 Watts & S. 468; *Hay v. Kramer*, 2 Ib. 137; *Haydock v. Tracy*, 3 Ib. 507; *Brown v. Bridges*, 2 Miles, 424.

<sup>2</sup> *Gylkyson v. Larue*, 6 Watts & S. (Penn.) 218; *Allison v. James*, 9 Ib. 380. A petition for benefit of the insolvent, with a schedule containing an outlawed debt, is not an admission sufficient, in Pennsylvania, to revive it. *Brown v. Bridges*, *supra*.

Sluby v. Champlin,<sup>1</sup> the court say, that it is generally received as law, that if a party acknowledges a debt, it is such a waiver of the protection of the statute as *repels the presumption of payment*. At and before that time it was the received construction, that an acknowledgment was recognized on the ground of rebutting a presumption of payment, and not on the ground of a *new promise*. In 1814, in Danforth v. Culver,<sup>2</sup> however, it was held, by the same court, that an acknowledgment does not revive the *old* debt, but is evidence only of a *new* promise, of which the former debt is the consideration. "It is not reconcilable," the court say, "with common sense, to say that the bare admission of the execution of the notes, in this case, accompanied with a declaration that the party meant to avail himself of the statute of limitations, shall be evidence of a *promise*, when the party protests against paying, and against his liability." And the court recognize and rely upon Murray v. Tilley, and Jones v. Moore, in Pennsylvania, before cited, and the opinion of Washington, J., in Reid v. Wilkinson, in the Circuit Court of the United States, before cited. In Lawrence v. Hopkins,<sup>3</sup> the court held the evidence not sufficient, stating that it showed neither an express nor an implied promise, but the contrary, as the plaintiff considered the demand unjust. In Sands v. Gelston,<sup>4</sup> which contains an able and elaborate opinion of Spencer, J., it was decided, that, if at the time of the acknowledgment, it was qualified in a way to repel the presumption of a promise to pay, then it was not evidence of a promise sufficient to revive the debt. This case has been appealed to in subsequent cases in the same State, as establishing the true construction.

At a later period, the Supreme Court of New York have declared (opinion of the court, by Marcy, J.), after adverting to the disfavor with which English and American courts have regarded the statute of limitations,—a circumstance which had gone far towards depriving defendants of all the benefits designed for them,—that the unqualified and unconditional acknowledgment of a debt is adjudged in law to imply a promise to pay; but an acknowledgment of its original justice, without recognizing its present existence, is not sufficient; that the language used by the party is to be interpreted according to the meaning and intention of the speaker; and that any thing going to *negative a promise* is to be

<sup>1</sup> Sluby v. Champlin, 4 Johns. 460.

<sup>2</sup> Danforth v. Culver, 11 Johns. 146.

<sup>3</sup> Lawrence v. Hopkins, 18 Johns. 511.

<sup>4</sup> Sands v. Gelston, 15 Johns. 511.



regarded as qualifying every other expression used. The statute, the court considered, was intended as one of *repose*, and that character, they considered, should be maintained.<sup>1</sup> Chief Justice Savage, in giving the opinion of the court, in *Hancock v. Bliss*,<sup>2</sup> says, "the language of Judge Story, in *Bell v. Morrison*, had been cited and adopted in this court, and in the court for the correction of errors."

215. The construction laid down and established by the courts of Pennsylvania and New York has received the entire approbation of the Supreme Court of Massachusetts. Thus where the defendant, upon an order and an account, said, at different times, "he had a due bill against the plaintiff, on which the order ought to have been applied, and given up, and he owed him nothing," "the due bill was either lost, or given up, and the order and account ought to have been settled," "he had another due bill, and his claims would cover all the plaintiff's claims against him; the whole ought to have been settled, and he owed the plaintiff nothing," "the due bill was given up, and the order and account ought to have been cancelled," "if he owed the plaintiff any thing he would pay him, but he owed him nothing," — these expressions, it was adjudged, had not the effect to take the case out of the statute. Putnam, J., who delivered the opinion of the court, referred to the more important decisions in Pennsylvania and New York, and said, expressly, that the views of the court were in accordance with those in the case of *Danforth v. Culver*, in the latter State, which has been cited. The court, in other words, recognized and acquiesced in the construction, that the admission of a debt must be consistent with a promise, and that, if it be accompanied with a declaration that the party intended to avail himself of the statute, it is insufficient to avoid the bar of the statute.<sup>3</sup>

The above case of *Bangs v. Hall* may be considered a leading case in Massachusetts.<sup>4</sup> It had, said Mr. Justice Morton, in delivering the opinion of the court, in *Bailey et al. v. Crane*,<sup>5</sup> been

<sup>1</sup> *Purdy v. Austin*, 3 Wend. 187.

<sup>2</sup> *Hancock v. Bliss*, 7 Wend. 267. And see also *Bradley v. Field*, 8 Ib. 272; *Stafford v. Bryan*, Ib. 585; *Gaylord v. Van Loan*, 15 Ib. 808; *Allen v. Webster*, Ib. 284; *Stafford v. Richardson*, Ib. 302; *Clarke v. Dutcher*, 9 Cowen, 674.

<sup>3</sup> *Bangs v. Hall*, 2 Pick. 368.

<sup>4</sup> In *Gardner v. Tudor*, 8 Pick. 206, the court saw no reason to vary from the doctrine laid down in *Bangs v. Hall*.

<sup>5</sup> 21 Pick. 823 (in 1838).



well considered, and was everywhere acknowledged to be sound law. "The principles there laid down," said he, "are, that to take a case out of the statute of limitations, there must be either an express promise to pay, or an unqualified acknowledgment of indebtedness." In the latter case, the law will imply a promise to pay. This implication may be rebutted, not only by a condition or qualification of the acknowledgment, but also by an express refusal to pay, or by a reliance on the statute, or by any other circumstance which shows a determination not to renew a promise to pay. What was set up as an acknowledgment amounting to an implied promise in this case was a letter directed to the plaintiff by the defendant, which was as follows: "I received your note yesterday. I hasten to inform you that next week I shall be able to send Mr. T. C. a statement of my property, and ask for a discharge. I should have done this before, but since I have been back, I have been sick, and have been obliged to work for my board. I have large demands on the merchants, S. & A., but cannot collect them, and presume I never shall." Per Morton, J.: "The letter contains no express promise. And although it may, perhaps, imply an acknowledgment of indebtedness; yet, if so, it contains such qualifications and explanations as to exclude any implication of a promise to pay. The defendant does not obviously contemplate a payment of the note, but avows his inability to pay, desires a discharge without payment, and clearly does not express a willingness, much less assume an obligation, to pay."<sup>1</sup>

216. The courts in Maine, without hesitation and most emphatically, recognize the construction as laid down by the courts in the above-mentioned States. The leading case is *Perley v. Little*,<sup>2</sup> where the defendant said, "If I owe you any thing, I will pay you, but I owe you nothing;" the court adjudged that the bar of the statute was not avoided by the acknowledgment. The words, "I owe you nothing," the court considered, were at least a balance

<sup>1</sup> See also *Barnard v. Bartholomew*, 22 Pick. 291; *Sumner v. Sumner*, 1 Met. 394. In *Webber v. President, &c., of Williams College* (23 Pick. 302), a letter from the treasurer of the college to the plaintiff, in answer to a demand of payment, proposed that, if the plaintiff would forbear bringing his action at that time, he should have the same rights for one year more than he then had. The plaintiff, in reply, stated that he would not postpone bringing his action, but in fact did so, until after the six years had elapsed. The court was of opinion that this was a sufficient compliance with the offer of the defendants; that they were bound by it; and that it was a good waiver of the statute. [As to effect of such a promise, see further, *post*, § 247 n.].

<sup>2</sup> *Perley v. Little*, 8 Greenl. (Me.) 97.

for the preceding *conditional promise*. And even without this, the court thought the conditional promise would not avail, as the case presented no proof that the defendant did then owe the plaintiff any thing. In this case, Chief Justice Mellen thought it unnecessary to examine the long catalogue of decisions upon the question. They were, he asserted, in many instances, contradictory, and often presenting distinctions which *now* appear to be more nice than wise, and more ingenious than substantial. Less refinement would have left the law upon the subject more certain; and would more effectually have produced the beneficial consequences anticipated to result from such a statute. In the construction of contracts, continued the learned judge, the courts are always desirous of ascertaining the meaning of the parties; and, if consistent with legal principles, of carrying that meaning into effect: and it was not easy to perceive why so plain a rule should have been departed from, in many instances, in the construction of those expressions relied upon as amounting to a new promise or an acknowledgment of a debt. He recognized the introduction of a more rational and consistent construction as having received high judicial sanctions.<sup>1</sup> In a later case, where the defendant acknowledged, that, within six years from the commencement of the action, the plaintiff's claim "was once due, but that he had paid it years before by having an account against him," it was held no sufficient acknowledgment, the court saying: "It would be a most unauthorized perversion of language, *worthy only of the old cases, which have been so justly repudiated*, to extract from what the defendant said an admission that he was then indebted to the plaintiff."<sup>2</sup>

217. In the Supreme Court of Connecticut, the court refer to the case before cited of *Sands v. Gelston*, in New York, in which they consider the principles of law applicable to questions of acknowledgment to be settled in a manner conformable to the meaning of the legislature. Therefore, where the defendant, in an action on a promissory note, to which was pleaded the statute, had said, "that such note had been paid, by the services of his wife, in a dwelling-house of the plaintiff," and the plaintiff proved

<sup>1</sup> This case was expressly recognized in *Porter v. Hill*, 4 Greenl. (Me.) 41; in *Miller v. Lancaster*, Ib. 159; in *Thayer v. Mills*, 2 Shep. 300; in *Lombard v. Pease*, Ib. 349; in *Oakes v. Mitchell*, 3 Shep. 360; and in *Coffin v. Bucknam*, 3 Fairf. 471.

<sup>2</sup> *Brackett v. Mountfort*, 3 Fairf. 72. And see *Deshon v. Eaton*, 4 Greenl. 413; *Warren Academy v. Starret*, 3 Shep. 443; *M'Clellan v. Crofton*, 6 Greenl. 346.

that payment had not been so made, it was held that this acknowledgment did not amount to evidence of a new promise. A debt, the court said, being barred by the statute, the defendant is entitled to take advantage of it, unless he consents to relinquish its protection, either expressly, or by evident implication.<sup>1</sup> The established principle of law, says Chief Justice Hosmer, in a subsequent case, may be expressed in the following manner: "An unqualified and unconditional acknowledgment of a debt as originally just and yet subsisting removes the bar of the statute of limitations."<sup>2</sup>

218. The Supreme Court of New Hampshire, in the year 1828, recognize the better opinion at that day to be, that an acknowledgment of a debt is only evidence from which a jury may, if there be nothing to the contrary, infer a promise which will take a case out of the statute; and that a jury cannot infer a promise from such an acknowledgment, when the party who makes it expresses at the time an intention not to pay it. In this case, the maker of a note authorized an agent to offer thirty dollars for the note, and the offer not being accepted, was held not to revive the debt against a plea of the statute.<sup>3</sup> Again, in 1830, when a case is to be taken out of the statute of limitations, by a new promise raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and a direct admission of a subsisting debt, which he is liable and willing to pay.<sup>4</sup> And the court admitted to be sound law what is laid down by Mr. Justice Story, in *Bell v. Morrison*, before given.

219. The Supreme Court of Vermont, in the year 1839, in the case of *Phelps v. Stewart*,<sup>5</sup> say: "It is settled law in this State, that an unqualified acknowledgment of the debt as unpaid and still subsisting is evidence from which a new promise to pay is to be inferred. In deciding what shall amount to such an acknowledgment, we have discarded the old rule of construction,

<sup>1</sup> *Marshall v. Dalliber*, 5 Conn. 480.

<sup>2</sup> *De Forest v. Hunt*, 8 Conn. 185. See also *Belknap v. Gleason*, 11 Ib. 160; *Austin v. Bostwick*, 9 Ib. 496; *Peck v. Botsford*, 7 Ib. 172; all showing that a new promise is the ground upon which an acknowledgment is binding. [But such an acknowledgment, if accompanied by a claim that the debt is barred by the statute, does not remove the bar. *Sanford v. Clark*, 29 Conn. 457.]

<sup>3</sup> *Atwood v. Colburn*, 4 N. H. 315.

<sup>4</sup> *Russell v. Cop*, 5 N. H. 154. See also *Bank v. Sullivan*, 6 Ib. 124; *Blair v. Drew*, Ib. 235; *Kelley v. Sanborn*, Ib. 46; *Kittredge v. Brown*, 9 Ib. 377.

<sup>5</sup> *Phelps v. Stewart*, 12 Vt. 263.

which had nearly operated to repeal the statute, and we now hold that the conduct and declarations of the party shall be understood in their natural and obvious sense, as if applied to any other subject.”<sup>1</sup>

220. In Virginia, Parker, J., in *Aylett's Executor v. Robinson*<sup>2</sup> (decided in 1837), says: “The modern decisions discarding the distinctions and refinements which had gone nigh to repeal the statute of limitations, and justly considering it as an act of repose, to protect against long-dormant claims, even when they might not have paid, have re-established the doctrine settled in England, soon after the making of the statute of 21 James I. c. 16, from which our law is taken, namely, that the subsequent promise or acknowledgment to take the case out of the statute ought to be such a one as, if declared upon, would support an action of itself; that is, it must be an express promise to pay, or such an acknowledgment of a balance then due, unaccompanied by reservations or conditions, as that a jury ought to infer it a promise to pay.”<sup>3</sup>

<sup>1</sup> See, to the same effect, *Burlow v. Bellamy*, 7 Vt. 54. [*Stevens v. Hewett*, 80 Vt. (1 Shaw) 262. A proposition to pay a specific sum in compromise, if accepted within a certain time, otherwise the offer to go for nothing, will not take a claim out of the operation of the statute. *Slack v. Norwich*, 32 Vt. (3 Shaw) 818. A receipt in full, excepting a specified item, “which may be adjusted as the facts may prove,” takes such items out of the statute. *Sweet v. Hubbard*, 86 Vt. (1 Vea.) 294. An agreement to pay part of the debt, on condition that it shall be in full satisfaction of the whole claim, does not avoid the statute. *Bowker v. Harris*, 80 Vt. (1 Shaw) 424. And see also *Phelps v. Williamson*, 26 Vt. (3 Deane) 280; *Hayden v. Johnson*, Ib. 768; and *post*, § 231, note.]

<sup>2</sup> 9 Leigh, 45.

<sup>3</sup> It was proved, in this case, that the testator had, within the time limited, been applied to for a settlement, when he said: “I am too unwell to settle now; when I am better I will settle your account.” The court, with the exception of the president (Tucker), were of opinion that this was not such an acknowledgment of the debt as took it out of the statute. In *Butcher v. Hixton*, 4 Leigh, 519, in 1838, Carr, J., quotes at length and with approbation from the opinion of Best, Ch. J., in *A’Court v. Cross*, *supra*, and in *Scales v. Jacob*, *supra*; and from the opinion of Lord Tenterden, in *Tanner v. Smart*, *supra*. The same judge, in *Farmer’s Bank v. Clarke*, 4 Leigh, 603, said, that the more recent and the more rational decisions considered the statute of limitations as one of repose, which ought to receive from the courts a firm and just support. In *Sutton v. Burness*, 9 Leigh, 881 (1838), the defendant admitted the plaintiff’s account to be just, but said at the same time that he had some offsets, and afterwards promised to settle all differences and accounts fairly, and not to plead the statute. This was held to be insufficient to defeat a plea of the statute, because the defendant did not acknowledge or promise to pay an ascertained balance; the acknowledgment being only of an unsettled account on which the balance might

221. An acknowledgment in Maryland must be of a present subsisting debt, unaccompanied by any qualification or declaration, which, if true, would exempt the defendant from moral obligation to pay. There must, say the courts of that State, be more than an admission that the debt is unpaid, and there must be admission or proof that the debt ever existed.<sup>1</sup> As late as the year 1840, Dorsey, J., in delivering the opinion of the court, says: "The acknowledgment of a debt, to take it without the statute, if not made in express terms, must be evidenced at least by facts, satisfactorily showing the admission of the debtor that the debt had never been paid."<sup>2</sup>

222. In Delaware, the admission must amount to an acknowledgment of a subsisting debt;<sup>3</sup> and the acknowledgment in such case will take the case out of the statute without an express promise to pay it.<sup>4</sup>

223. Although in North Carolina, it was held, in *McLinn v. McNamara*,<sup>5</sup> that a promise to *settle* an account was an admission of a subsisting liability, and an engagement to pay any balance that might be found due upon such settlement; yet in *McGlenney v. Fleming*,<sup>6</sup> it was held, that where the debtor, at the time of his acknowledgment, either refuses to pay the debt, or offers a smaller sum, saying, that, if his offer is not accepted, he will plead the statute, a promise to pay cannot be implied. The general rule recognized by the courts of that State is, that there must be a promise, express or implied, "something that indicates an existing willingness or intention to pay, or remain bound."<sup>7</sup> In this case, Chief Justice Ruffin said, it seemed to the court, that although a party acknowledged that he contracted a debt, and

turn out to be greater or less, according to the difficulty of explaining the original transactions. And see Joynes's Essay upon "The Act of the General Assembly of Virginia, passed April 3, 1838, entitled," &c., pp. 106-123.

<sup>1</sup> *Oliver v. Gray*, 1 Harr. & Gill (Md.), 204; *Rogers's Ex'r v. Waters*, 3 Gill & Johns. (Md.) 69; *Frey v. Kirk*, 4 Ib. 509; *Keplinger v. Griffith*, 2 Ib. 296; *Kent v. Wilkinson*, 5 Ib. 497; *Sotheron v. Hardy*, 8 Ib. 133. [*Stockett v. Sasseer*, 8 Md. 374; *Dawson v. Kong*, 20 Md. 442.]

<sup>2</sup> *Beltzhoover v. Yewell*, 11 Gill & Johns. 216.

<sup>3</sup> *Waples v. Layton*, 3 Harring. (Del.) 508.

<sup>4</sup> *Black's Ex'rs v. Reybold*, Ib. 528.

<sup>5</sup> 2 Dev. & Batt. 82.

<sup>6</sup> *Ibid.* 129.

<sup>7</sup> *Smallwood v. Smallwood*, 2 Dev. & Batt. 330. And see *Bank of Newbern v. Sneed*, 3 Hawk. 500; *Ferguson v. Taylor*, 1 Hayw. 20; *Martin v. Waugh*, 2 Dev. & Batt. 517. [*McCurry v. McKesson*, 4 Jones, Law (N. C.), 510; *Mills v. Taber*, 5 Jones, Law (N. C.), 412.]

that he has not paid it, yet if he, at the same time, insist that the statute of limitations exonerates him from liability, and upon that ground refuses to pay, the bar of the statute in such case is not removed. It cannot be implied, he maintained, that the party expressly promised to do a thing which, it is proved, he expressly refused to do.

224. The decisions upon the subject of new promises and acknowledgments have not been as uniform in South Carolina as those of most of the other States, though the now settled construction of the statute in that State on the subject is not very different from that which appears to have been established in the States above mentioned. In delivering the opinion of the court, in *Young v. Monpœy*,<sup>1</sup> Johnson, J., said: "I do not intend to be understood as laying down the doctrine broadly, that nothing short of a direct and positive promise will revive a debt already barred; if there be an unequivocal admission that the debt is still due and unpaid, unaccompanied by any expression, declaration, or qualification indicative of an intention not to pay, the state of facts out of which the law implies a promise is then present, and the party is bound by it." The acknowledgment of the party in this case to which this language of the court was applied was: "He had not been served with a notice of protest, and therefore had nothing to do with it (the note); but if he had been regularly notified, it would have been paid long ago." It was held insufficient. Subsequently it was held, that, where a note is barred by the statute, there must be an express promise to pay, or an unequivocal admission of an existing debt, unaccompanied by any qualification showing an intention not to pay, in order to revive it.<sup>2</sup>

<sup>1</sup> 2 Bail. 278.

<sup>2</sup> *Alcock v. Ewan*, 2 Hill, 326; cited in 2 Rice's Dig. of S. C. 87. See also *Copen v. Auburn*, 2 Bail. 283, where an offer to pay a few dozen of wine on account of the debt, for the purpose of getting the note out of the creditor's hands, was not sufficient. To the same effect, *Holbreck v. Hunt*, 1 M'Mullan's L. 197 (in 1841), cited in Joynes's Essay on the Act of Limitations of Virginia; and *Lockhart v. Eave's Adm'r*, Columbia, May Term, 1838, Rice's Dig. *supra*. Where a defendant admitted an account, but said, "there was a discount to a greater amount, and that he would therefore not pay it," the acknowledgment was not such as to take the case out of the statute. *Adm'r of Lee v. Polk's Ex'rs*, 4 M'Cord, 215. There are other decisions of South Carolina, of an earlier date, different, as, for instance, "the note had not been paid, and that he would not pay it, unless compelled by law, as it was out of date, and he had received no consideration for it," was held sufficient to take the debt out of the statute. *Lee v. Perry*, 3 M'Cord, 552; Rice's Dig. *supra*. [But it is



225. There is no State in which the courts have been more uniformly strict in their construction of the statute in respect to new promises and acknowledgments, than Kentucky. In *Bell v. Administrators of Rowland*,<sup>1</sup> the court declared, nearly forty years since, "that, in order to take a case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at the time, coupled with the original consideration, or an express promise to pay it, must be proved to have been made within the time prescribed by the statute." In *Harrison v. Handley*,<sup>2</sup> Chief Justice Bibb, after recognizing the authority of the foregoing case, says: "The acknowledgment from which the law is to raise a promise contrary to the provision of the statute must be clear and express, where the mind is brought directly to the point of debt or no debt at the present time; not whether it was once an existing debt. That the law will argumentatively make it a debt *in presenti*, if the party does not in his acknowledgment say it is not, or prove payment, is a proposition that cannot be granted in opposition to the statute. Where the limitation has run, to get clear of it, the whole burden of proof is thrown on the plaintiff, to prove a good and subsisting debt and promise to pay within the period prescribed to his action." In another case<sup>3</sup> it was held, that an admission that an account is *right* is not sufficient, because it might be so, though it had been paid; but that an admission that an account is *just* implies that it is a present subsisting debt, and is a sufficient answer to a plea of the statute. In *Head's Ex'r v. Manner's Adm'rs*,<sup>4</sup> Chief Justice Robinson said, in giving the court's opinion, that the rule in *Bell v. Rowland* was too firmly fixed to be now disturbed; and he concluded his opinion by declaring that "vague, equivocal, or indeterminate expressions, susceptible of different interpretations, will not revive a debt which had been barred by time: if they would," he reasoned, "the statute might be easily evaded, and perjury and injustice might be encouraged, instead of being, as it were, the object of the statute that they should be checked and frustrated."

226. In the State of Tennessee, the law is laid down with great

still the doctrine in South Carolina that a slight acknowledgment, before the statute has become a bar, is sufficient to take the case out of the statute. *Deboach v. Turner*, 7 Rich. (S. C.) 148.]

<sup>1</sup> Hardin, 301.

<sup>2</sup> 1 Bibb, 403.

<sup>3</sup> 4 Dana, 565.

<sup>4</sup> 5 J. J. Marsh. 255.



strictness ; as thus : “ The new agreement is just as much an original contract as the first agreement was, and is no continuation of the original promise. The debtor binds himself where he was not bound before.” <sup>1</sup>

227. In Illinois an unqualified promise to pay a debt is held sufficient to take the case out of the statute ; <sup>2</sup> but the promise must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise. <sup>3</sup> Where the promise to pay is accompanied with a qualification, or upon a contingency, it rests with the plaintiff to do away the qualification, or show that the contingency has happened. If the party acknowledge that the demand is still due and subsisting against him, it will be sufficient to infer a promise to pay. So, also, proof of an actual payment of part of the debt by the party, or his authorized agent, will be sufficient evidence for the jury to infer a promise to pay the balance. <sup>4</sup>

228. The Supreme Court of Missouri say, that “ the principle established by the court was, that, in order to take a case out of the statute of limitations, an express acknowledgment of the debt, as a debt due at that time (coupled with the original consideration), or an express promise to pay, must be proven to have been made within the time prescribed by the statute.” “ If the bar of the statute ” (say the court) “ is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate.” <sup>5</sup>

229. In Alabama, an acknowledgment, to have any effect, must be an unconditional one, that the debt is due, or the liability exists, when the acknowledgment is made, and not merely that the demand was originally just. <sup>6</sup>

<sup>1</sup> Per Catron, Ch. J., in giving the opinion of the court, in *Belote v. Winna*, 7 Yerg. 534 ; and see *Russell v. Gass*, 1 Mart. & Yerg. 270, in which it was held, that an agreement to settle by the plaintiff's books, though those books showed a balance against the defendant, did not deprive the defendant of the benefit of the statute. See also *Harwell v. M'Culloch*, 2 Tenn. 275. [*Butter v. Winters*, 2 Swan, 61. Nor does an agreement to refer. *Broddie v. Johnson*, 1 Sneed, 464.]

<sup>2</sup> *Mellick v. Seelherst*, Bre. 171.

<sup>3</sup> *Kimmel v. Schwartz*, Bre. 218.

<sup>4</sup> *Mellick v. Seelherst*, *supra*.

<sup>5</sup> *McKean v. Thorp*, 4 Mo. 858 ; and fully recognized in *Davis v. Herring*, 6 Ib. 21. See also *Elliott v. Lecke*, 5 Ib. 208 ; *Buckner v. Adm'r of Wheaton*, 4 Ib. 100.

<sup>6</sup> *St. John v. Garrow*, 4 Porter (Ala.), 226, per Hopkins, J. [*Evans v. Cary*, 29 Ala. 99.]

230. In many of the foregoing decisions of different State tribunals, reference is made to decisions of the Supreme Court of the United States ; and upon the authority of the language of the court, by Mr. Justice Story, in *Bell v. Morrison*, the State courts, in many instances, have relied with emphatic confidence.

231. The law then, as now, fully established both in England and in this country, clearly is, 1. That a debt barred by the statute of limitations may be revived by a new promise ; 2. That such new promise may either be an express promise, or an implied one ; 3. That the latter is created by a clear and unqualified acknowledgment of the debt ;<sup>1</sup> 4. That if the acknowledgment be ac-

<sup>1</sup> [And the recent cases show a tendency to greater strictness in determining what constitutes "a clear and unqualified acknowledgment." *Weaver v. Weaver*, 54 Penn. St. 152 ; *Smith v. Fly*, 24 Texas, 345 ; *Gilmer v. McMurray*, 7 Jones (N. C.), Law, 47 ; *Morehead v. Gallinger*, 9 Iowa (1 With.), 519 ; *Strickland v. Walker*, 1 Ala. (S. C.) 512 ; *Penn v. Crawford*, 16 La. An. 255 ; *Sweet v. Franklin*, 7 R. I. 355 ; *Creuse v. Defigurere*, 10 Bosw. (N. Y.) 122 ; *Wolfensbeger v. Young*, 47 Penn. St. 516 ; *Rawdon v. Tobey*, 11 How. (U. S.) 493 ; *Warren v. Walker*, 10 Shep. (Me.) 453 ; *Blue Hill Academy v. Ellis*, 32 Me. (2 Red.) 260 ; *Manning v. Wheeler*, 18 N. H. 486 ; *Ventris v. Shaw*, 14 Ib. 422 ; *Bradley v. Briggs*, 22 Vt. 98 ; *Carruth v. Page*, Ib. 179. This case considers and approves *Phelps v. Stewart* (*ante*, § 219), and seems to be inconsistent with *Paddock v. Colby*, 18 Vt. (3 Washb.) 485, where it was held, that an expression of willingness to settle a claim, if established, although accompanied with a denial of indebtedness, is a sufficient acknowledgment, if the indebtedness be proved to exist. And so seems *Moore v. Stevens*, 38 Vt. (4 Shaw) 308. *Von Hemert v. Porter*, 11 Met. (Mass.) 210 ; *Smith v. Eastman*, 8 Cush. (Mass.) 355 ; *Sherman v. Wakeman*, 11 Barb. (N. Y.) S. C. 254 ; *Cocks v. Weeks*, 7 Hill (N. Y.), 45 ; *Farley v. Kustenbader*, 8 Barr (Penn.), 418 ; *Kensington Bank v. Patton*, 14 Penn. St. (2 Harris) 479 ; *Davis v. Steiner*, 14 Penn. St. (4 Harris) 479 ; *Harbold v. Kuntz*, 16 Penn. St. (4 Harris) 210 ; *Hazlebaker v. Reeves*, 12 Penn. St. (2 Jones) 264 ; *Patterson v. Cobb*, 4 Fla. 481 ; *Ayers v. Richards*, 12 Ill. 146. In this case the debtor heard the items of an account read to him, and admitted the correctness of each item and of the whole account ; but stated that he thought the whole or a part of certain items had been paid by his son, and that he would see his creditor and settle with him. Admissions held insufficient. See also *Westbrook v. Beverly*, 11 S. & M. (Miss.) 419 ; *Penaro v. Fournoy*, 9 Law, 269 (U. S. Dist. Ct. Ga.) ; *Dickinson v. McCaney*, 5 Ga. 486 ; *Fischer v. Hess*, 9 B. Mon. (Ky.) 614 ; *Brown v. St. Bank*, 5 Eng. (Ark.) 134 ; *Smith v. Leeper*, 10 Ired. (N. C.) 86 ; *Taylor v. Stedman*, 11 Ib. 447 ; *Zacharias v. Zacharias*, 23 Penn. St. 452 ; *Beck v. Beck*, 25 Ib. 124 ; *Emerson v. Mills*, 27 Ib. 278 ; *Douglas v. Elkins*, 8 Foster (N. H.), 26 ; *Marseilles v. Kenton*, 17 Penn. St. 238 ; *Kyle v. Wells*, 17 Ib. 286 ; *Bell v. Crawford*, 8 Gratt. (Va.) 110 ; *Boxley v. Gayle*, 19 Ala. 151 ; *Bryan v. Ware*, 20 Ib. 687 ; *Pond v. Williams*, 1 Gray (Mass.), 680 ; *Long v. Jameson*, 1 Jones (N. C.), Law, 476 ; *McBride v. Gray*, Busbee, Law (N. C.), 420 ; *Adams v. Torrey*, 26 Miss. (4 Cush.) 499 ; *Gibson v. Grosvener*, 4 Gray (Mass.), 606 ; *Walker v. Wootten*, 18 Ga. 119 ; *Chambers v. Garland*, 8 Iowa, 322 ; *Lofton v. Aldridge*, 8 Jones (N. C.), Law, 328 ; *Rings v. Brooks*, 26 Ark. 540 ; *Green v. Goble*, 7 Kan. 297. A new promise to pay the principal only does not exempt the

accompanied by such qualifying expressions or circumstances as repel the idea of an intention or contract to pay, no implied promise is created. The point to be resolved in all cases is, whether the acknowledgment or promise is a mere continuation of the original promise grounded upon presumption of payment, or whether it is a *new* contract springing out of, and supported by, the original consideration. It clearly appears, both upon principle and authority, that it is the latter; and the decisions of all the courts throughout the country are remarkably uniform in so establishing it.

232. A devise, therefore, of real and personal estate for the payment of just debts, will not revive a debt upon which the statute has fully operated before the testator's death.<sup>1</sup> The testator, in such case, makes no promise, direct or implied, as he only intends

interest from the operation of the statute. 29 Penn. St. 189. The creditor asked for a settlement, and the debtor asked if no other notes than his own would do. Held, no acknowledgment. 11 Ired. 477. Where a surety, about to be sued, before the statute has run, hands to the creditor, for suit, a note which had been executed to him by the principal debtor as an indemnity, it was held a sufficient admission. *Russell v. La Rogue*, 11 Ala. 858. In Mississippi the statute provides that the plaintiff must show "that the very claim sued on was presented and acknowledged to be due and unpaid." And where an order on a debtor for the amount of a bill which was claimed to be due from him was presented to him, to which he replied, "that he thought the bill high, that he had not the money to pay it at that time, but would see the creditor and settle," it was held no sufficient acknowledgment. *Thornton v. Crisp*, 14 S. & M. (Miss.) 52. And see also *Lawrence v. Mangum*, 80 Miss. (1 George) 171; *Shackleford v. Douglass*, 81 Miss. (2 George) 95. A promise to pay the principal only, without the interest, does not avoid the statute. *Duffie v. Phillips*, 81 Ala. 571. And see also *Pearson v. Darrington*, 82 Ala. 227. A parol promise to pay a debt already barred, at a future time and by a different mode of payment, does not revive the debt barred. *Price v. Price*, 84 Iowa, 404.]

<sup>1</sup> It has been already made clear, that if the death occur before the statute has barred the debt, and a trust is created upon real estate to pay debts, the statute does not operate, as it is a direct trust cognizable only in equity, and therefore beyond the reach of the statute. See *ante*, Ch. XVI. § 169. [*Murray v. Mechanics' Bank*, 4 Edw. (N. Y.) Ch. 567; *Braxton v. Wood*, 4 Gratt. (Va.) 25; *Bloodgood v. Bruen*, 4 Sandf. (N. Y.) Sup. Ct. 427; *Carrington v. Manning*, 18 Ala. 611; *Agnew v. Fetterman*, 4 Barr (Penn.), 56; *Tazewell v. Whittle*, 18 Gratt. (Va.) 829. But when clear and explicit, a testamentary trust for the payment of debts suspends the operation of the statute on such debts as are not barred at the death of the testator. "The earlier decisions that a trust for payment of debts is a direction not to plead the statute of limitations have been properly swept away." Per Gibson, C. J. *Ibid*. And in *Williamson v. Naylor*, Lord Lyndhurst said, such a testamentary trust would operate upon such debts as were not barred at the time of making the will. In this case the testator made a schedule of the debts, which he directed to be paid. 2 *Younge & Collyer*, 208, 210, note.

that the courts of law and equity are to determine what are just debts, and to leave his executor at liberty to use all means of resistance against demands upon his estate, to which the testator himself might have objected; and the testator, relying on the statute, may have destroyed his vouchers. The statute, which was made for the benefit of those who may have paid, but have not the means of proving it, does not permit a demand of a debt beyond its limits to be enforced upon a probability that it is discharged.<sup>1</sup> This construction stands upon a natural conjecture as to intention, is sustained by principle, and is a guard against the danger and the injury of inviting stale demands, and of discouraging provisions for the payment of debts.<sup>2</sup> In the Supreme Court of Pennsylvania, it was held, that the statute is a bar to an action on a promissory note, given by a testator in his lifetime, but not due until after his death, if no suit be brought against his executor until more than six years have elapsed after the debt became due; and this, notwithstanding provisions in the will for the payment of all debts, and for carrying on the testator's business after his death.<sup>3</sup> A testator gave to his daughter A £50, to be paid to her at the expiration of *ten years* after his decease, and then declared it "to be his further mind and will, that if any of his children should, after his decease, make any demand against his executors for any *services* they might have performed for him in his lifetime, then, instead of the bequest mentioned to be given to such child exhibiting such demand, he gave them the sum of fifteen shillings apiece, and no more. In an action brought by A against the executor for *services* rendered the testator, it was held, that the will did not prevent the operation of the statute.<sup>4</sup>

<sup>1</sup> *Burke v. Jones*, 2 Ves. & Be. 275. The Vice-Chancellor, Sir Thomas Plummer, in this case, said, that he had spared no pains in collecting every case in print, or that he could hear of, bearing on the question; and that the result was, that there was not one case in which a contrary doctrine had been established, and that a contrary doctrine had been disapproved of by every judge from the time of Lord Hardwicke. Lords Hardwicke, Kenyon, and Alvanley, have all disapproved of former *dicta*, that a trust for the payment of debts would sustain a claim upon which the statute had attached before the testator's death. By Chancellor Kent, in *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266. See also *Dewdney, ex parte*, 15 Ves. (Sumn. ed.) 479.

<sup>2</sup> Chancellor Kent, in *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 266; Chief Justice Tilghman, in *Smith v. Porter*, 1 Binn. (Penn.) 209; *Peck v. Botsford*, 7 Conn. 172; *Walker v. Campbell*, 1 Hawks (N. C.), 304; *Brown v. Griffith*, 6 Munf. (Va.) 450.

<sup>3</sup> *Man v. Warner*, 4 Whart. (Penn.) 455.

<sup>4</sup> *Cressman v. Carter*, 2 Browne (Penn.), 123.

233. The return in an insolvent's petition of a debt as due the plaintiff affords no inference of a promise, and is not a sufficient acknowledgment.<sup>1</sup> So, where the maker of a promissory note of more than six years' standing died insolvent, and a collateral guarantor of the note was appointed a commissioner on his estate, the allowance of the note by the commissioner, as a valid claim against the estate, being an official act, is not a new promise; he was in the exercise of an official duty, and the statute not having attached, he could do no otherwise than to allow it.<sup>2</sup>

<sup>1</sup> *Brown v. Bridges*, 2 Miles (Penn.), 424. [*Christy v. Flemington*, 10 Barr (Penn.), 129. And see *ante*, § 218, note. *Roscoe v. Hale*, 7 Gray (Mass.), 274; *Stoddard v. Doane*, *ib.* 887; *Richardson v. Thomas*, 18 Gray (Mass.), 381. The entry of the debt is made *alio intuitu* than that of taking the debt out of the statute. But it is a *prima facie* written acknowledgment of an existing debt, without reference to the statute of limitations, and it may be considered in connection with other evidence. *Woodbridge v. Allen*, 12 Met. (Mass.) 470. It is a new promise. *In re Eldridge et al.* U. S. D. C. East. Dist. Va. 12 N. B. R. No. 13, 1875. By the law of Louisiana, such an entry upon the schedule of creditors, though made by the assignee, will take the debt out of the statute even as against a joint debtor, who is not insolvent. *Morgan v. Meteyer*, 14 La. Ann. 612. Nor is a deed of assignment made by a debtor for the payment of certain debts, and for the payment of his debts generally, and a partial payment made by the assignee to a creditor. *Reed v. Johnson*, 1 R. I. 81; *Davis v. Edwards*, 6 Eng. Law & Eq. 520; *Everett v. Robertson*, 1 Ellis & E. 16. But held otherwise in *Barger v. Durwin*, 22 Barb. (N. Y.) 68; and *Peckett v. King*, 34 Barb. (N. Y.) 198. Nor the entry of a debt by a debtor in an unsigned schedule of his liabilities, made for his own use. *Wellman v. Southard*, 30 Me. (17 Shep.) 425. But when the defendant was called upon by his creditor, who held against him a note more than six years overdue, for a statement of his affairs, and in the statement was inserted the note amongst his liabilities, it was held a sufficient acknowledgment. *Holmes v. Macksell*, 8 C. B. (N. Y.) 789.]

<sup>2</sup> *Gardner v. Nutting*, 5 Greenl. (Me.) 140. [Nor will the report of a master to whom a petition in lunacy, after the death of a lunatic, is referred, that a certain sum of money had been expended by the committee for his maintenance, take the claim of the committee out of the statute as against the heir-at-law of the lunatic who is not a party to the application. *Wilkinson v. Wilkinson*, 12 Eng. Law & Eq. 191. Nor a decree of indebtedness in equity. *Phelps et al. v. Brewer et al.*, 9 Cush. 390. But where, on a bill to enforce a charge acquired by a judgment creditor on the estate of the debtor, a receiver was appointed, and, at the hearing, a reference as to incumbrances on the estate was directed, a statement of the facts and claim carried in before the master under such inquiry by an incumbrancer, not a party to the suit, was held to take the charge, as to the interest, out of the statute. *Greenway v. Broomfield*, 12 Eng. Law & Eq. 189; *Handley v. Wood*, *ib.* And an acknowledgment of indebtedness in an answer in equity removes the bar of the statute. *Brigham v. Hutchins*, 1 Wms. (Vt.) 569. But an averment of readiness to account, coupled with the averment that the balance is in favor of the respondent in an answer in equity, is no waiver of a prior plea of the statute of limitations. *Bradford v. Spyker*, 32 Ala. 134. And where, in a bill in equity against vestrymen of a church, to procure a decree of sale of church property to satisfy a lien thereon, the vestrymen

234. If the cause of action arise from the breach of a contract *to do an act* at a time specified, and it is once barred by the statute, a subsequent acknowledgment by the party that he broke the contract will not take the case out of the statute. In an action for not accepting and paying for a set of prints from the plays of Shakespeare, a letter from the defendant was given in evidence, in which he says: "I ceased taking in the numbers of the Boydell Shakespeare, many years ago, in consequence of the engagement not having been fulfilled, on the part of the proprietors, and not having been applied to from that time till very lately, I do not consider myself called on to complete the set." Lord Ellenborough held, that the defendant's liability could not be affected by this declaration. He has only acknowledged that he was guilty of default ten or twelve years ago. How does this show that the plaintiff has any cause of action which has occurred within six years? If a man acknowledges the existence of a debt barred by the statute, the law has been supposed to raise a new promise to pay it, and thus the remedy is revived; but no such effect can be given

answered and assented to the sale, but disputed the claim, it was held, that as the statute prohibited the sale without the consent of the rector and others, and no such consent was given in this case, the assent of the vestrymen was an implied admission that the debt was due, and was a waiver of the objection, that the claim was a statute one, and abandoned by lapse of time. *Allender v. Vestry, &c.*, 8 Gill (S. C.), 166. So, where a bill was filed by a receiver (appointed in a creditor's suit against A, the judgment debtor), which alleged that A was the executor and surviving partner of B, and a devisee under his will, that all, or nearly all, the debts and liabilities of the firm had been compromised or paid and discharged, and that upon a settlement of the estate of B, there would be found a large balance due A individually, or as one of the partners, and also in right of his wife, as devisee or heir of B, and prayed for an account, and A put in an answer alleging that a debt owing by S to C, with interest upon it, was a subsisting and valid claim against the estate of his testator, entitled to priority over the claims of the legatees and devisees under the will, he himself, in right of his wife, being one of such legatees and devisees, it was held, that, in a suit brought by the executor of C against A to recover the amount of the debt, such acknowledgment was sufficient to take the case out of the statute. *Bloodgood v. Bruen*, 4 Sandf. (N. Y.) Sup. Ct. 427. But this case was reversed in the Court of Appeals. 4 Selden, 362. And the giving a mortgage, to secure the payment of a note after the statute has run against it, is an acknowledgment that the note is due and unpaid, which takes it out of the statute. *Grayson v. Taylor*, 14 Texas, 672; *Balch v. Onion*, 4 Cush. (Mass.) 559; *Merrills v. Swift*, 18 Conn. 257. An undelivered mortgage, however, though duly executed, acknowledged, and recorded, is not a sufficient acknowledgment. *Merriam v. Leonard*, 6 Cush. (Mass.) 151. A gave an order on B to pay C a sum of money, when collected for A. The order was held a sufficient acknowledgment of indebtedness to C, to take the claim out of the operation of the statute. *Spangler v. McDaniel*, 8 Ind. 275.]



to an acknowledgment, where the cause of action arises from the doing, or omitting to do, some act, at a particular moment, in breach of a contract.<sup>1</sup> Where the declaration was, that defendant on consideration, &c., promised to invest plaintiff's money on good security; breach, that he invested it on bad security; pleas, general issue and statute of limitations; replication, that defendant promised as above within six years; proof, that within that time defendant acknowledged the security to be bad, and promised that plaintiff should be paid: held, that plaintiff could not recover, the declaration stating no debt to which the subsequent promise could be applied. Contracts of this sort, the court held, could not be revived by any subsequent promise.<sup>2</sup> There is, therefore, a distinction between a promise to pay a sum of money, and a contract for the performance of a particular act; and this distinction has been recognized by the Supreme Court of the United States.<sup>3</sup>

<sup>1</sup> *Boydell v. Drummond*, 2 Campb. 157; and see *Gibbons v. M'Casland*, 1 Barn. & Adol. 691. [So an acknowledgment does not revive a right of action for a tort, which is barred by the statute. *Goodwyn v. Goodwyn*, 16 Ga. 144; and see also *Thomasson v. Keaton*, 1 Sneed (Tenn.), 155. But where a deputy sheriff attaches property and takes a receiptor, who fails to respond when demand is made for the property to satisfy the execution, a return of the execution unsatisfied gives a cause of action against the sheriff from the return. But if the sheriff bring suit against the receiptor, this is a continuous acknowledgment of his liability during the pendency of the suit, which keeps alive the claim against him, notwithstanding the lapse of the time within which the sheriff may be sued. *Welles v. Russel*, 88 Conn. 198.]

<sup>2</sup> *Whitehead v. Howard*, 2 Brod. & Bing. 872.

<sup>3</sup> *Wetzell v. Bussard*, 11 Wheat. (U. S.) 309. [As to effect of acknowledgment and part payment on judgments, bonds, &c., see *post*, § 247, note.]



## CHAPTER XXI.

## CONDITIONAL AND INDEFINITE ACKNOWLEDGMENTS.

235. THE acknowledgment of a debt, if accompanied with a promise to pay *conditionally*, is of no avail, unless the condition to which the promise is subjected by the defendant is complied with, or the event has happened upon which the promise depends. It would be absurd to say, that a conditional promise is the *continuation* of one which is unconditional. Therefore, the cases wherein it has been held, that if the condition accompanying the acknowledgment is complied with, it will avail, and not otherwise, must go on the ground that the acknowledgment furnishes a new promise, in the words of Mr. Justice Story, in *Bell v. Morrison*, “springing out of, and supported by, *the original consideration*.” All those cases, according to Lord Chief Justice Tenterden, “proceed upon the principle, that, under the, ordinary issue of the statute of limitations, an acknowledgment is only evidence of a promise to pay; and unless it is conformable to, and maintains the promises in, the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect. The question then comes to this: *Is there any promise* in this case which will support the promises in the declaration? The promises in the declaration are absolute and unconditional to pay when thereunto afterwards requested. The promise proved here was, ‘I will pay you as soon as I can;’ and there *was no evidence of ability* to pay, so as to raise that, which was in its terms a qualified promise, into one that was absolute and unqualified.”<sup>1</sup> Chief Justice Marshall, in delivering the opinion of the Supreme Court of the United States, in *Wetzell v. Bussard*,<sup>2</sup> held, that certain declarations could not be construed into a revival of the original cause of action, unless that was done on which the revival was made to depend. Says he: “It may be considered a new promise,

<sup>1</sup> *Tanner v. Smart*, 6 B. & Cress. 603; *Bidwell v. Rogers*, 10 Allen (Mass.), 438.

<sup>2</sup> *Wetzell v. Bussard*, 11 Wheat. (U. S.) 309. See also *Moore v. Bank of Columbia*, 6 Peters (U. S.), 86, where it was held that the evidence proved no new promise.

for which the old debt is a *sufficient consideration*.” “I know,” says Carr, J. (in the case of the Farmers’ Bank *v.* Clarke, in the Court of Appeals of Virginia),<sup>1</sup> “there are many old cases, which consider the statute founded on the presumption of payment; that whatever repels that presumption is, in legal effect, a promise to pay the debt; and that though such acknowledgment is accompanied with only a *conditional* promise, or even a refusal to pay, the law considers the condition or refusal void, and the acknowledgment itself as an unconditional answer to the statute. But,” he continues, “the more recent, and I think the more rational, decisions take a different view of the case. They consider this a statute of repose, which ought to receive from the courts a firm and just support. They consider the acknowledgment a *new promise*, not a continuance of the old.”<sup>2</sup>

236. As to the extent of the binding effect of conditional acknowledgments in particular cases: Where, to a demand of above six years’ standing, the party indebted, on being applied to for payment, admitted he was bound in honor, and should pay “*when he was able*,” Lord Kenyon ruled this to be a conditional promise, and that the plaintiff was bound to show the sufficient ability of the defendant.<sup>3</sup> The defendant, being indebted to the plaintiff on

<sup>1</sup> Farmers’ Bank *v.* Clarke, 4 Leigh (Va.), 608. Brooke, J., was of the same opinion. See also Aylett’s Ex’r *v.* Robinson, 9 Ib. 45; Sutton *v.* Barrett, Ib. 881; and the earlier case of Butcher *v.* Hixton, 4 Ib. 519.

<sup>2</sup> [The legal effect of acknowledging a debt, barred by the statute, is that of a promise to pay the old debt, which promise the law implies from the acknowledgment, and for which the old debt is a consideration in law; but, if the promise is limited to payment of the old debt in a certain time, or in a particular manner, or out of a specific fund, the creditor can claim nothing more than the promise gives him, for the old debt is revived no further than as a consideration for the new promise. Philips *v.* Philips, 8 Hare, Ch. 299. But see *contra*, Carshore *v.* Huyck, cited *post*, § 247, note.]

<sup>3</sup> Davies *v.* Smith, 4 Esp. 36. [Lafarge *v.* Jayne, 9 Barr (Penn.), 410; Thompkins *v.* Smith, 1 Denio (N. Y.), 247; Sherman *v.* Wakeman, 11 Barb. (N. Y.) Sup. Ct. 254; Wakeman *v.* Sherman, 5 Selden (N. Y.), 88. But it was held, in a late case in Vermont, contrary to the current of the authorities, that the plaintiff need not show defendant’s ability. Cummings *v.* Gassett, 19 Vt. (4 Washb.) 308. And see also Sennott *v.* Homer, 30 Ill. 429. Where the debt was admitted to be due, and the debtor said, if he were able, he should be willing to pay all his debts, and he subsequently inherited several hundred dollars, it was held that, if his language could be regarded as referring to a future ability, it would mean an ability to pay all his debts, and without proof of such ability the action could not be maintained; and it was also held that the willingness to pay depended on his existing ability at the time of the conversation, and that the burden of proof was on the plaintiff. Manning *v.* Wheeler,

two overdue bills of exchange, gave the following undertaking: "In consideration of your not proceeding on the bills, I hereby debar myself of the statute of limitations, in case of my being sued for the recovery of the amounts of said bills; and I hereby promise to pay them whenever my circumstances enable me to do so, and I may be called on for that purpose." In an action on the agreement, where issue was joined on the plea of the statute of limitations, held, that the statute began to run as soon as the defendant became of ability to pay, although the plaintiff had had no notice or knowledge of such ability, and had made no demand of payment.<sup>1</sup> In another case, the defendant being called for payment, after saying, he would be happy to pay the debt *if he could*, added, that if the plaintiff would recover for him a debt due to him from one G., he might therewith satisfy his own debt, it was held, that the promise was conditional, and inasmuch as the defendant's ability to pay was not proved, that it was not sufficient to defeat the bar of the statute; and a new trial was refused.<sup>2</sup> The defendant, in another case, being urged for payment, said he "was going over to H. in the course of the next week, and would help the plaintiff to £5 *if he could*." This acknowledgment was accompanied with a condition, which had not been satisfied by the evidence.<sup>3</sup> To pay "as soon as convenient," renders it incumbent on the plaintiff to prove ability and convenience.<sup>4</sup> Where the promise was, "if E. will say I have had the timber," or, "prove it by E. and I will pay for it," it is a conditional promise, and therefore of no avail, unless the condition, as so expressed, is complied with.<sup>5</sup> Where A promised, after six years, to pay a debt in certain specific articles, it was held, that the promise came within the principle of the decision above cited of Lord Kenyon; and that, it being a conditional promise, it must appear that the plaintiff offered to accept the specific articles.<sup>6</sup> A recognizance having

13 N. H. 486. The statute runs from the date of the debt, not from the time of ability to pay, as there is no new contract. *Didier v. Davidson*, 3 Sandf. (N. Y.) Ch. 61. But see *contra*, § 113, *ante*.]

<sup>1</sup> *Waters v. Earl of Kanet*, 2 G. & Dav. 166.

<sup>2</sup> *Ayton v. Bolt*, 4 Bing. 105. [*Cocks v. Weeks*, 7 Hill (N. Y.), 45; *Bullock v. Smith*, 15 Ga. 895.]

<sup>3</sup> *Gould v. Shirley*, 2 M. & Payne, 581.

<sup>4</sup> *Edmunds v. Downer*, 2 Crompt. & Mees. 459.

<sup>5</sup> *Robbins v. Otis*, 1 Pick. (Mass.) 870.

<sup>6</sup> *Bush v. Barnard*, 8 Johns. (N. Y.) 318.

been taken in too large sum, by the fraud of the counsel, and satisfaction had by extent on the land of the debtor, the latter applied to the creditor to refund the excess, who replied, that *if there was any mistake, he would rectify it, but he knew of none*. In an action of assumpsit to recover this excess, to which the statute was pleaded, it was held, that this language of the creditor, the *fraud being proved*, took the case out of the statute.<sup>1</sup> Where the maker of a promissory note denied his signature, declaring it to be a forgery, but said, that if it could be proved that he signed the note, he would pay it, and it was proved on the trial that he did sign it, this was held sufficient to take the case out of the statute.<sup>2</sup> A vote passed at a town meeting, appointing a committee to "settle the dispute" between the town and the plaintiff, was viewed in the light of a conditional acknowledgment. It was referring the plaintiff to the committee, as agents, for an answer to his demand, and for the determination of the defendants respecting it. The opinion of the agents was to govern the town; there being no evidence of any pre-existing determination, or even knowledge respecting the demand. It is so far from being an acknowledgment of a debt unconditionally, that it clearly expresses an ignorance on the part of the defendants, or their doubts respecting their liability. *If the committee should determine that it was justly due*, the party sued might be liable as on a *conditional* promise; but the plaintiff furnished no evidence on that point.<sup>3</sup> In a letter written to a plaintiff within six years, the defendant says: "I can never be happy until I have not only paid you, but all to whom I owe money;" and "Your account is quite correct; and oh, that I were now going to enclose the amount of it!" Held, that such promise, accompanied with this expression, "It is impossible to state to you what will be done in my affairs at present; it is difficult to know what will be best, but immediately it is settled, you shall be informed," is an absolute unconditional promise, and not a qualified or conditional promise.<sup>4</sup> Admitting the correctness of the account, with the exception of one item, was held not a conditional admission; that the excepted item was a proper charge, and a waiver of the statute, upon the plaintiff's giving evidence of its

<sup>1</sup> Morton v. Chandler, 8 Greenl. (Me.) 9.

<sup>2</sup> Seward v. Lord, 1 Greenl. (Me.) 168.

<sup>3</sup> Fiske v. Inhabitants of Needham, 11 Mass. 452.

<sup>4</sup> Dodson v. Mackey, 4 Nev. & Man. 827, and 80 Eng. Com. Law, 877.

being correct.<sup>1</sup> In the above, and in similar cases, the liability of the defendant is to be ascertained by the test which he himself has prescribed.<sup>2</sup> In *Hayden v. Williams*,<sup>3</sup> say the court, when the action is brought after six years, and the subsequent acknowledgment of the defendant is the very ground of the action, the plaintiff must take it altogether as he finds it, and he cannot use the acknowledgment without annexing the qualification. This has been declared to be reasonable as regards the plaintiff, because the statute being a perfect bar, the defendant ought not to be deprived of its protection, unless he has seen fit to waive it.<sup>4</sup> If the original promise is conditional, and the latter absolute, the latter will not vary the terms of the first promise.<sup>5</sup>

237. Where to a plea of the statute, the plaintiff replied a promise within six years, and proved a promise to pay *when of ability* made three years after the original cause of action accrued, and within six years of the commencement of the action, Burrough, J., and Park, J., were of opinion, that, as the promise was made *before* the six years had expired, the defendant had no right to qualify it, and the plaintiff was not bound to prove his ability.

<sup>1</sup> *Lucas v. Thorrington*, 5 Ala. 504.

<sup>2</sup> *Daniel v. Pitt*, 1 Camp. 886, note; *Dean v. Pitt*, 10 Johns. (N. Y.) 85; *Purley v. Little*, 8 Greenl. (Me.) 97; *Farmers' Bank v. Clarke*, 4 Leigh (Va.), 608; *Hunt v. Wilkinson*, 1 Gill & Johns. (Md.) 497; *Porter v. Hill*, 4 Greenl. (Me.) 42; *Deshon v. Eaton*, Ib. 418; *American Bank v. Baker*, 4 Met. (Mass.) 164.

<sup>3</sup> *Hayden v. Williams*, 7 Bing. 105.

<sup>4</sup> *Bangs v. Hall*, 1 Pick. (Mass.) 868.

<sup>5</sup> *Lonsdale v. Brown*, 8 Wash. (Cir. Co.) 404. [A, who owed a debt which was barred by the statute, promised to pay if he could not prove that B had paid it. Held, that A's promise revived the debt, and that the *onus probandi* was on A to show that B had paid it. *Richmond v. Fugua*, 11 Ired. (N. C.) 445. A promise by a debtor to "go to work at his trade and pay as fast as he could," and a promise to pay "as soon as he could," were held to be too uncertain and indefinite to constitute a conditional promise to pay, and the promises were held absolute. *First Cong. Soc. v. Miller*, 15 N. H. 520; *Butterfield v. Jacobs*, Ib. 140. A promise to pay "if it is just," or "if the creditor will swear to it," no acknowledgment. *Goodwin v. Buzzell*, 85 Vt. (6 Shaw) 9. "If you will buy C's land, I will pay him the amount I owe you," held a conditional acknowledgment, valid only in case of the purchase of the land. *Luma v. Edmiston*, 5 Sneed (Tenn.), 159. I am "disposed to do what is just and right," no acknowledgment. *Rhodes v. Allen*, 10 Gray (Mass.), 85. A signed a note with B, as B's surety; B died more than six years after the note became due. A is applied to to pay the note, and writes requesting the applicant to call upon the executrix of the other maker, adding that "what she may be short I will assist to make up." Held, that legal proceedings need not be taken against the executrix, before proceeding against the surety, but that an application was sufficient. *Humphreys v. Jones*, 14 L. J. (N. S.) Exch. 254; s. o. 14 Mee. & W. 1. Where the debtor promises to pay, if allowed a little time, forbearance for two years is sufficient. *Gray v. Tams*, 6 Gill (Md.), 82.]

But Chief Justice Best, and Gaselee, J., were of opinion, that it was incumbent on the plaintiff to have proved the defendant's ability to pay; that in none of the cases had a distinction been made as to the time of the promise, whether before or after the six years; and that after the six years the plaintiff has no other cause of action, except on the new promise, and that being conditional, the condition attached to it must be observed.<sup>1</sup> In the case of the *Farmers' Bank v. Clarke*, in the Court of Appeals, of Virginia,<sup>2</sup> Tucker, president, observed: "It is said that this promise being made before the expiration of the five years (the time prescribed by the Virginia statute), the party was bound and had no right to clog the promise of payment with a condition. This would have been very true, had the suit been brought within five years. But when, after the lapse of five years, it became necessary for the plaintiff to lay hold of this promise, he must take it as he finds it; he must take it altogether; he cannot garble it. He may *renounce* it altogether, or he may *take* it altogether; but it would be without example to permit him to take as much as would suit his purpose, and reject the rest."

238. An acknowledgment may be *indefinite* in respect to the intended application of it to a particular debt; and it ought clearly to appear, in all cases, that it relates to the identical debt which is sought to be recovered upon the strength of it.<sup>3</sup> In such cases, it is held, that it is properly left to the jury to decide as to the intention.<sup>4</sup> Thus, where a letter was relied on to defeat the

<sup>1</sup> *Scales v. Jacob*, 8 Bing. 688. But *aliter* in South Carolina, *Young v. Monpœy*, 2 Bail. (S. C.) 278.

<sup>2</sup> *Farmers' Bank v. Clarke*, 4 Leigh (Va.), 608. [*Shaw v. Nicoll*, 1 R. I. 488. The maker of a note wrote a letter to the payee, offering to give a new note on time, and saying, "You shall have your pay if I live, and the whaling business does not fail. Now if you will agree to this, I will renew, or else you must do the next best." The payee did not accept the offer, but brought an action on the note, and it was held that the promise was not sufficient. *Mumford v. Freeman*, 8 Met. (Mass.) 432. And see *Philips v. Philips*, *ante*, § 285, note.]

<sup>3</sup> *Sans v. Gelston*, 15 Johns. (N. Y.) 511; *Clarke v. Dutcher*, 9 Cow. (N. Y.) 674. [*Robbins v. Farley*, 2 Strobb. (S. C.) 848; *Sherrod v. Bennett*, 8 Ired. (N. C.) 309; *Brailsford v. James*, 8 Strobb. (S. C.) 171; *Arey v. Stephenson*, 11 Ired. (N. C.) 86; *Buckingham v. Smith*, 28 Conn. 453.]

<sup>4</sup> *Beal v. Nind*, 4 Barn. & Ald. 571; *Frost v. Benough*, 1 Bing. 286. [An acknowledgment, or promise, to take the case out of the statute, must specify or plainly refer to the particular debt, or demand, or cause of action, which is sought to be recovered. And where there is any dispute as to the facts which go to prove the making a new promise, the question is a mixed one of law and fact for the jury. But where the facts are undisputed, the question is one of law for the court. *Martin v. Broach*, 6 Ga. 21.]



statute. The letter stated that a balance of a certain amount was due on *the bill*, without describing the *particular* bill, and the jury found for the plaintiff the amount stated in the defendant's letter, and the court refused to disturb the verdict. If, said Mr. Justice Park, the letter referred to any other bill accepted by the defendant, as it had been argued for the defendant, "the defendant should have established that in proof." "The whole of the circumstances," said Mr. Justice Bosanquet, "were left to the jury, and there is no reason for disturbing the verdict." "If the jury believed," said Mr. Justice Anderson, "that this was the bill referred to, the defendant's letter is sufficient to take the case out of the statute."<sup>1</sup> A similar doctrine seems to be maintained by the English courts generally,<sup>2</sup> and Chief Justice Denman gave it as the opinion of the court in *Tippetts v. Hearne*, cited in the note below, that where it appeared clearly enough that the payment was made on account of an existing debt, and there was no proof of any other debt than the one in question, the jury were warranted in applying it to that. In *Whitney v. Bigelow*, in Massachusetts,<sup>3</sup> it was held, that a general acknowledgment of being indebted to the plaintiff is sufficient *prima facie* to take the demand in suit out of the statute; that the *onus* lies on the defendant to show that he had reference to a different demand; and that the jury may infer from circumstances that the particular debt was referred to. In *Bayley v. Crane*, in the same State,<sup>4</sup> the court said, that as the defendant had not shown that there was any other debt due from him to the plaintiff, his letter of acknowledgment must be presumed to apply to the note in suit: and, had there been any other demand between the parties, it could not have been known to which it applied, and so could not be applied to either. In *Stafford v. Bryan*, in the Court of Errors, of New York,<sup>5</sup> there was more than one demand, and the admission of the defendant was that he *owed the complainant*. Sutherland, J., who gave the opinion of the court, considered it was unnecessary to determine

<sup>1</sup> *Dabbs v. Humphreys*, 10 Bing. 446; and 25 Eng. Com. Law, 190.

<sup>2</sup> *Evans v. Davies*, 1 Adol. & El. 840; *Tippetts v. Hearne*, 1 Cro. Mees. & Rosc. 252; *Bird v. Gammon*, 8 Bing. (N. C.) 383; *Dodson v. Mackey*, 8 Adol. & El. 225; *Huntley v. Wharton*, 11 Ib. 934; *Waters v. Tompkins*, 1 Tyr. & Grang. (Exch.) 137.

<sup>3</sup> *Whitney v. Bigelow*, 4 Pick. (Mass.) 410. [*Grey v. Tams*, 6 Gill (Md.), 82. And see *post*, § 244.]

<sup>4</sup> *Bailey v. Crane*, 21 Pick. (Mass.) 323.

<sup>5</sup> *Stafford v. Bryan*, 3 Wend. (N. Y.) 352.



whether that was a sufficient acknowledgment of the *note* in question; because the evidence in the case showed that there was, at that time, an *unliquidated account* of long standing between the parties to which the defendant might have referred. How the balance stood at that time, he said, did not clearly appear. The defendant might have made the declaration, and still never have intended to admit the existence or justice of *the note*. If effect, he said, could be given to the declarations or admissions which may have been proved to have been made by a defendant, without referring them to the demand upon which the suit may have been brought, they ought not to be considered as referring to such demand, and as evidence of a new promise to pay it, and that most especially they ought not to be considered when the defendant denies under oath that he has ever acknowledged or promised to pay the demand. In *Smallwood v. Smallwood*, in North Carolina,<sup>1</sup> there were several debts due from the defendant, and it did not appear which of them was demanded by the plaintiff in a letter, to which the defendant replied. By the Chief Justice, in giving the opinion of the court: "Here the expression is, 'your demand,' without saying what that is, or how it arose, or how it may be ascertained. It is impossible to collect from these expressions, by themselves, what was the nature or amount of that demand." The decision was, that there should be not only a clear acknowledgment of liability in such a case, but that it should refer distinctly to the debt in question. In *Moore v. The Bank of Columbia*, in the Supreme Court of the United States,<sup>2</sup> the action was on a promissory note for \$500, at sixty days, drawn by the plaintiff in error, in favor of G. D., and by him indorsed to the Bank of Columbia. The statute being pleaded, the plaintiff proved by a witness, within the time limited, that he (the witness), who was a clerk in the bank, had seen the defendant drinking in a tavern with two companions, — the defendant appearing elevated; that he (the witness) overheard a conversation between the defendant and his companions, and that the defendant boasted he was clear of debt, except one of five hundred in the Bank of Columbia, which, said the defendant, "*I can pay at any time.*" The books of the bank showed that no other discounted note stood charged to the defendant at the time of the said conversation. The court below

<sup>1</sup> *Smallwood v. Smallwood*, 2 Dev. & Batt. (N. C.) 330.

<sup>2</sup> *Moore v. Bank of Columbia*, 6 Peters (U. S.), 86.

left it to the jury as evidence of an acknowledgment to defeat the plea of the statute. The judgment was reversed. Thompson, J., who gave the opinion of the court, holds, that there was no direct admission of a present subsisting debt. He held, also, that it was uncertain whether the conversation *referred to the note in question*. "The evidence that this was the only five-hundred-dollar note of his lying over in the bank might afford a plausible conjecture that this was the one alluded to. But that is not enough, according to the rule laid down in *Bell v. Morrison*."<sup>1</sup>

239. If the acknowledgment be indefinite *as to the amount* of the demand acknowledged, as if it be an acknowledgment of a balance, and it is left uncertain what that balance is, the plaintiff, it has been held, is entitled to nominal damages;<sup>2</sup> but there must be an absolute admission of some debt being due.<sup>3</sup> But if the acknowledgment is broad and particular enough in its terms to include a particular debt, the amount actually due, it has been held, may be proved by extrinsic evidence.<sup>4</sup> According to *Bell v. Morrison*,<sup>5</sup> it is indispensable for the plaintiff to establish, by inde-

<sup>1</sup> 1 Peters, 851.

<sup>2</sup> Per Lord Tenterden, in *Dickinson v. Hatfield*, 5 Car. & Payne; *Dodson v. Mackey*, 4 Nev. & Man. 827.

<sup>3</sup> *Chesly v. Dalby*, 4 Younge & Coll. 288. (Ex. Eq. side.)

<sup>4</sup> *Barnard v. Bartholomew*, 22 Pick. (Mass.) 291; *Sumner v. Sumner*, 1 Met. (Mass.) 894. In New Hampshire, in the case of a declaration by the maker of a promissory note, upon its being presented for payment, that he had paid part, and had certain demands against the holder, but that something was due, which he was ready to pay, without specifying any sum, it was held sufficient to take the case out of the statute, and entitle the plaintiff, at least, to nominal damages. If any thing was due, the plaintiff was entitled to recover; and if he failed in rendering the amount certain, he must suffer the loss so far as the uncertainty extends, but an uncertainty as to the amount of damages is no bar to the plaintiff's recovery, if any thing is due. *Eastman v. Walker*, 6 N. H. 367. The principle was considered well settled, in *Dixon v. Deveridge*, 12 Car. & Payne, 104; *Fierze v. Thompson*, 1 Taunt. 121. The court also cite *Dickinson v. Hatfield*, 1 Moody & Mal. 141. A similar decision was made in New Hampshire, in *Kittredge v. Brown*, 9 N. H. 377; and that where the amount is due is admitted, it will be evidence to show the extent of the promise, and that the party designed to hold himself liable in such sum. It was held, in Maine, in *Dinsmore v. Dinsmore*, that the precise amount due need not have been named by the party to be charged in his acknowledgment, and that it is sufficient if he admits an amount approximating to the amount claimed; and the precise amount may be proved *aliunde*. *Dinsmore v. Dinsmore*, 8 Shep. (Me.) 433. [But see *Suter v. Sheeler*, 22 Penn. St. 808; *McRea v. Leary*, 1 Jones (N. C.), Law, 91; *Shaw v. Allen*, Busbee (N. C.), Law, 58; *Huff v. Richardson*, 19 Penn. St. 388; *Shitler v. Bremer*, 23 Ib. 416; *Mask v. Philler*, 82 Miss. (8 George) 237.]

<sup>5</sup> 1 Peters (U. S.), 851.

pendent evidence, the extent of the balance due him before there can arise any promise to pay it as a subsisting debt. "The evidence," says Mr. Justice Story, in delivering the opinion of the court, "is clear of the admission of an unsettled account, as well from the letters of Butler, as the conversations of Morrison. The letter acknowledged that the partnership 'was owing' the plaintiff, but as he had not the books, he could not settle with him. If this evidence stood alone, it would be too loose to entitle the plaintiff to recover any thing. The language might be equally true, whether the debt were one dollar or ten thousand dollars." "If it be not indispensable for the plaintiff to show the extent of the balance," says the learned judge, "does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party to bring forward stale demands after a lapse of time, when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury, by removing the bar upon slight acknowledgments of an indeterminate nature? Can an admission that something is due, or some balance accruing, be justly construed into a promise to pay any debt or balance which the party may assert or prove before a jury? If there be an express promise to such an effect, that might be pressed as a dispensation with the statute; but the question here is, whether the law will imply such a promise from language so doubtful and general." Parker, J., in the Court of Appeals, of Virginia,<sup>1</sup> takes a like view of the subject: "To allow an acknowledgment of an unsettled demand, liable to be diminished by offsets, to take a case out of the statute, lets in most unsatisfactory proof of the *quantum* of damages, and has induced the jury in this very case to imply a promise to pay the whole amount of the account, although the defendant insisted he had some offsets against it, which, after the lapse of time, he might have been unable to prove." Mr. J. Cabell, in the same case, stated, that the utmost that even a jury could infer from the acknowledgment proved in the case, was a promise to pay an unascertained balance. Then he proceeds: "That balance might be one cent only, or it might be within one cent of the original amount of the plaintiff's demand; what it really was depended upon testimony *aliunde*. This promise, then, certainly left the defendant exposed to all the inconveniences arising from the loss of testimony in relation to his

<sup>1</sup> Sutton v. Burrus, 9 Leigh (Va.), 881.

offsets, and we cannot therefore give effect to it without frustrating the great object of the statute.”<sup>1</sup>

<sup>1</sup> The reasoning and the views taken by the Supreme Court of the United States, and by the Court of Appeals of Virginia, are maintained in that State, in *Aylett v. Robinson*, 9 Leigh, 45; in North Carolina, in *Smallwood v. Smallwood*, 2 Dev. & Batt. 390, and in *Peebles v. Mason*, 2 Dev. 347; in Pennsylvania, in *Magee v. Magee*, 10 Watts, 172; in Maine, in *Fray v. Garcelon*, 5 Shep. 145; in Missouri, in *Davis v. Herring*, 6 Mo. 21. [Where part of an account is barred by the statute, an admission of indebtedness and a general promise to settle and pay, is not such a new promise as will take the case out of the statute, for it may refer to that part unaffected by the statute. *Morgan v. Walton*, 4 Barr (Penn.), 521.]

## CHAPTER XXII.

## ACKNOWLEDGMENT BY PART PAYMENT.

240. AN acknowledgment or new promise may be inferred from the fact of part payment of a contract within six years, or from the payment of a smaller, on account of a greater, sum of money due from the party making the payment to the party to whom it is made.<sup>1</sup> So, from giving security for a part or whole within

<sup>1</sup> See *Whitcomb v. Whiting*, 2 Doug. 652. [*Rucker v. Frazier*, 4 Strobb. (S. C.) 93; *Ayer v. Hawkins*, 19 Vt. (4 Washb.) 28; *Carshore v. Huyck*, 6 Barb. (N. Y.) Sup. Ct. 588; *Smith v. Simms*, 9 Ga. 418. But part payment is only *prima facie* evidence and may be rebutted by other evidence, and by the circumstances under which it is made. *State Bank v. Woody*, 5 Eng. (Ark.) 688; *Arnold v. Downing*, 11 Barb. (N. Y.) Sup. Ct. 554; *Jewett v. Petit*, 4 Mich. 508; *Aldrich v. Morse*, 28 Vt. (2 Wms.) 642. Payment of a judgment recovered on a suit for interest on a note is not a payment from which a promise to pay the principal can be inferred. *Morgan v. Rowlands*, 7 L. R. Q. B. 493. Part payment, accompanied by a denial that more is due, will not revive the statute. *United States v. Wilder*, 13 Wall (U. S.) 254. And the court cannot imply a promise from the mere fact of part payment, as an inference of law. It must be left to the jury. *White v. Jordan*, 27 Me. (14 Shep.) 370. Part payment on a note by a surety, in the presence and with the knowledge and without any dissent of the principal, is equivalent to payment by the principal. *Whipple v. Stevens*, 2 Foster (N. H.), 219. So if made by agent, without authority, if afterwards assented to by the principal. *First Nat. Bk. of Utica v. Ballou*, 49 N. Y. 155. But not without the assent. *Harper v. Fairley*, 53 N. Y. 442. But the indorsement of a payment on a note by the payee, with the knowledge of the maker, is not an acknowledgment in writing by the latter. *Areaux v. Mayeux*, 28 La. An. 172. But part payment by a surety after the action is barred does not revive his liability for the other part. *Emmons v. Overton*, 18 B. Mon. (Ky.) 643. Part payment after action brought will not take a debt out of the statute. *Bateman v. Pindar*, 2 G. & D. 790. But see, *contra*, *Love v. Hackett*, 6 Ga. 486. And more recent cases, both in this country and England, have denied that from the mere fact of part payment of the principal, the jury are authorized to infer a promise to pay the rest. *Smith v. Westmoreland*, 12 S. & M. (Miss.) 663; *Davidson v. Harrison*, 38 Miss. (4 George) 41. And in *Davies v. Edwards* (6 Eng. Law & Eq. 520, s. c. 15 Jur. 1044), where the payment was by the assignee of the debtor, the court, per Parke, Baron, holds the following language: "I am of opinion that no rule ought to be granted in this case, and that the judge at *nisi prius* was right in nonsuiting the plaintiff. The last statute of limitations, applicable to this class of cases, is the 9 Geo. IV. c. 14, which makes a promise in writing requisite to take a case out of the operation of the statutes on this subject, but which enactment is followed by a proviso, that nothing therein contained 'shall alter or take away, or lessen, the effect of any payment of any principal or interest made by any person whatsoever.' The question is, whether

six years,<sup>1</sup> or a negotiable note;<sup>2</sup> and the payment of interest has the same effect as payment of a part of the principal.<sup>3</sup> Thus,

there has been such a payment in the present case as will take it out of the statute of limitations, in respect to the plaintiff. The subject was not so much considered at the time when *Jackson v. Fairbank*, and the subsequent case in the Queen's Bench of *Brandram v. Wharton*, were decided, as it has been since. It has more recently undergone much consideration, and the principle has been laid down in this court, that a part payment, in order to be sufficient to take a case out of the statute, must be made on account of a sum admitted to be due, accompanied by a promise to pay the remainder. The first case establishing that principle is *Tippets v. Heane*, 1 C. M. & R. 252, which was decided in 1884, where I delivered the judgment. The question there was, whether a sum of money, proved to have been paid to the plaintiff, on what account did not appear, was sufficient to take the case out of the statute of limitations. I am there reported, I dare say correctly, to have said, 'In order to take a case out of the statute of limitations by a part payment, it must appear in the first place that the payment was made on account of the debt. Secondly, it must appear that it was made on account of the debt for which the action is brought. But the case must go further; for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt; because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt.' The same rule was laid down by Lord Abinger, in 1840, in his judgment, in a case of *Waugh v. Cope*, 6 M. & W. 824, and afterwards in 1847, in *Wainman v. Kynman*, 1 Exch. 118; where it was held, that a part payment of a debt would not take a case out of the statute of limitations, unless there were also a promise in writing to pay the remainder. (a) If this doctrine is applicable to a payment made by the party himself, it is impossible to contend that a payment by the assignees of a bankrupt or insolvent involves a promise by him to pay the remainder of the debt, so as to enable the creditor to sue him for it after the expiration of the six years. If payment of this dividend would not have the effect of taking the case out of the statute, supposing it had been made by the party himself, *a fortiori* it cannot have that effect when not made by the party or his agent, but by a third party, namely, an assignee appointed to distribute his effects. There has, therefore, been no part payment in this case sufficient to take it out of the statute; for the only one proved is one by a third party to the promissory note, under circumstances which show it is not binding either as against himself or the other makers." See also note by the editors to *Bradfield v. Tupper*, 7 Eng. Law & Eq. 541; and *s. p.* *Roscoe v. Hale*, 7 Gray (Mass.), 274; *Stoddard v. Doane*, *Id.* 387.]

<sup>1</sup> *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Manderston v. Robertson*, 4 Man. & Ryl. 410. [*Balch v. Onion*, 4 Cush. (Mass.) 559. But an undelivered mortgage, though executed, acknowledged, and recorded, is no security. *Merriam v. Leonard*, 6 Cush. (Mass.) 151.]

<sup>2</sup> *Ilseley v. Jewett*, 2 Met. (Mass.) 168.

<sup>3</sup> *Wyatt v. Hodson*, 8 Bing. 309. It makes no difference, that the interest paid

(a) In *Willis v. Newham*, 8 Y. & J. 519, it was held, that a verbal acknowledgment of a payment of part of a debt, within six years, is not sufficient, within the 6 Geo. IV. c. 14, to take the case out of the statute of limitations; but this has been recently overruled in *Cleave v. Jones*, 15 Jur. 515; *s. c.* 4 Eng. 514.

the payment of interest by the principal promisor, in a joint and several promissory note, annually, from the time when the note was given, is sufficient to take the note out of the statute.<sup>1</sup> But, in case there was originally no express promise to pay interest, a tender of the debt in court, though it takes the debt out of the statute, a promise to pay interest will not be inferred from a tender of the principal.<sup>2</sup> The giving of a note to secure the payment of interest accrued on a note previously given is a sufficient acknowledgment of the existence of continued indebtedness upon the latter.<sup>3</sup> In like manner, a debtor's account stated with his creditor, in which credit is given for interest, is the same as if the money had been paid.<sup>4</sup>

241. In respect to promissory notes and bonds, the common medium of proof of a part payment, or of interest, is an indorsement of it thereon.<sup>5</sup> But it is always considered essential that

within the time limited by the statute accrued before. *Beasley v. Greenslade*, 2 Tyrw. (Ex.) 121; *Fryeburg v. Osgood*, 8 Shep. (Me.) 176. [*Bradfield v. Tupper*, 7 Eng. Law & Eq. 541; *Conwell v. Buchanan*, 7 Blackf. (Ind.) 537; *Sanford v. Hayes*, 19 Conn. 591; *Walton v. Robinson*, 5 Ired. (N. C.) 841; *Worthington v. Grimsditch*, 15 L. J. (N. S.) Q. B. 52; s. c. 10 Jur. 26; *Braildon v. Walton*, 1 Exch. 617; *Barrow v. Kennedy*, 17 Cal. 574.]

<sup>1</sup> *Sigourney v. Drury*, 14 Pick. (Mass.) 387.

<sup>2</sup> *Collyer v. Wilcox*, 4 Bing. 315.

<sup>3</sup> *Wenman v. Mohawk Ins. Co.*, 18 Wend. (N. Y.) 267. [*Sigourney v. Wetherell*, 6 Met. (Mass.) 558.]

<sup>4</sup> *Smith v. Ludlow*, 6 Johns. (N. Y.) 267.

<sup>5</sup> *Searle v. Lord Barrington*, 2 Strange, 826; *Turner v. Crisp*, Ib. 827; *Glyn v. Bank of England*, 2 Ves. Sen. 43; *Gale v. Capron*, 1 Adol. & Ell. 102, and 28 Eng. Com. Law, 46; *Ilsey v. Jewett*, 2 Met. (Mass.) 168; *Sigourney v. Drury*, 14 Pick. (Mass.) 387; *Howe v. Thompson*, 2 Fairf. (Me.) 152; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Dowling v. Ford*, 1 Mees. & Welsb. (Ex.) 325; *Hunt v. Bridgham*, 2 Pick. (Mass.) 581; *Warren v. Hathaway*, 2 App. (Me.) 345; *Hathaway v. Haskell*, 9 Pick. (Mass.) 42; *Roseboom v. Billington*, 17 Johns. (N. Y.) 182; *Read v. Hurst*, 7 Wend. (N. Y.) 408. *Connelly v. Pierson*, 4 Gilm. (Ill.) 108; *Alston v. State Bank*, 4 Eng. (Ark.) 457; *Chandler v. Lawrence*, 8 Mich. 261. By statute in Massachusetts, the indorsement must not be by or in behalf of the party to whom the payment is made. Rev. Stat. c. 120, § 17; *Williams v. Burbank*, 8 Met. (Mass.) 352. The indorsement of payment on a promissory note, written by the holder thereof, by the express assent and request of the promisor, is sufficient proof of such payment to prevent the operation of the statute of limitations. *Sibley v. Phelps*, 6 Cush. (Mass.) 172; *Smith v. Simms*, 9 Ga. 418; *Hawley v. Griswold*, 42 Barb. (N. Y.) 18. But the indorsement must be assented to. The holder cannot give credit on the note for services rendered and thus take the case out of the statute. *Philips v. Mahan*, 52 Mo. 197; *Kyger v. Ryley*, 2 Neb. 20. An acknowledgment of payment in writing, though unsigned, is sufficient to take the debt out of the statute. *Cleave v. Jones*, 4 Eng. Law & Eq. 514; s. c. 20 Law Jour. Rep. (N. S.) Exch. 238, and 15 Jur. 515,



ch indorsement be made *bona fide*, and with the privity of the obligee; for, otherwise, the creditor might be enabled to bind the debtor by an acknowledgment or new promise, which the latter never intended to make. In debt on a bond, dated 1785, before Lord Ellenborough, it appeared there were several indorsements on the bond, acknowledging the receipt of interest down to 1793, which were proved to be in the handwriting of the defendant. These were allowed to be good evidence of the bond remaining unsatisfied at the date of the last indorsement. The presumption from lapse of time being thus repelled, the plaintiff, for the purpose of meeting certain direct evidence of payment, in 1794, proposed to read other indorsements, down to 1795, acknowledging the receipt of interest and part of the principal. But these latter indorsements were not in the handwriting of the defendant. An objection being taken to their being read, Lord Ellenborough thought it necessary to prove that they were on the bond at, or recently after, the times when they bore date. Although it may seem, he said, at first sight, against the interest of the obligee to admit part payment, he may thereby, in many cases, set up the bond for the residue of the sum secured. If such indorsements, he continued, were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself, to contradict the fact of payment. And he had been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and he was of opinion that they could not properly be admitted, unless they were proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest.<sup>1</sup> It has ever been held unjustifiable, since the time of Lord Ellenborough, to take for granted, in all cases, because a person admits that any portion of an amount due him has been paid, that it in reality has been; and that the mere indorsement of a payment upon a promissory note by the holder, after the expiration of the time limited by the statute, affords no

where *Willis v. Newham*, 3 Y. & J. is overruled. And so is an oral admission. *Williams v. Gridley*, 9 Met. (Mass.) 485; *Sibley v. Lambert*, 80 Me. (17 Shep.) 858. But, in Louisiana, it has been held, that the entry of a check on the books of the drawer as unpaid does not interrupt prescription running in his favor. *Harman v. Claiborne*, 1 La. An. 342.

<sup>1</sup> *Rose v. Bryant*, 2 Campb. 321. [*Beatty v. Clement*, 12 La. An. 82. And see also *Maskell v. Pooley*, Ib. 661; *Briggs v. Wilson*, 89 Eng. Law & Eq. 62.]

legal evidence of such payment. The true doctrine is laid down in *Roseboom v. Billington*,<sup>1</sup> by the Supreme Court of New York, in which the court held that an indorsement upon a note or bond made by the payee or obligee, without the *privity* of the debtor, cannot be admitted as evidence of payment in favor of the party making the indorsement, unless it appear that it was made at a time when its operation would be against the interest of the party making it; and that, if such proof were given, it would be proper for the consideration of the jury. In *Read v. Hurst*,<sup>2</sup> one who was indebted to another was directed to pay the amount owing by him to a creditor of the person to whom the money was due, without a specification of the account to which it should be applied; and the money was received and indorsed on a note in part payment of the same, which indorsement was subsequently relied on to take the note out of the operation of the statute. It was held that the evidence was not sufficient, as a *question of law*, to prove an acknowledgment by the maker within six years; and the court below having expressed an opinion that it was sufficient, and not having submitted it as a *question of fact* for the jury, the judgment was reversed, and a *venire de novo* awarded.

242. In an action by an administrator on a promissory note, commenced more than six years after the date of the note, an indorsement in the handwriting of the intestate of a payment purporting to be made more than two years *before* the statute would attach, and six months prior to his death, it was held the jury might regard as evidence of a new promise, though there was no proof other than that mentioned, of the time when the indorsement was actually made. At the time of the indorsement, the intestate was under no temptation to make it, for the sake of evidence, as the statute would not have attached for more than two years; and furnishing proof that he had received part of the contents of the note was clearly against his interest. Proof of this description is a kind of moral evidence, in regard to which no rea-

<sup>1</sup> *Roseboom v. Billington*, 17 Johns. (N. Y.) 182; *Read v. Hurst*, 7 Wend. (N. Y.) 408; *Clapp v. Ingersoll*, 2 Fairf. (Me.) 88; *Gibson v. Peoples*, 2 M'Cord (S. C.), 418; *M'Ghee v. Green*, 7 Port. (Ala.) 537; *Wanton v. Dale*, 1 Ib. 247; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110; *Bailey v. Crane*, 21 Ib. 323; *Butcher v. Hixton*, 4 Leigh (Va.), 519; *Wilcox v. Pearman*, 9 Ib. 144. [*Brown v. Hutchings*, 11 Ark. 88. Relationship does not give a wife authority to make a payment. *Butler v. Price*, 115 Mass. 578.]

<sup>2</sup> *Read v. Hurst*, 7 Wend. (N. Y.) 408.

sonable doubt can be entertained.<sup>1</sup> So, upon the same ground it has been held that an indorsement on a note of payment on account, *proved* to have been made within six years from the date of the note and time of suit brought, was sufficient to prevent the operation of the statute.<sup>2</sup> In one case, the indorsement of part payment was made by the defendant himself; and, therefore, no question could arise as to its being at that time a sufficient acknowledgment of indebtedness to remove the presumption of previous payment. But the *date* of the indorsement was not entered by him, and therefore it became material to prove when that entry was made. The adding of a date on the back of a note, it was held, is not an alteration of the instrument, and in no wise affects its validity.<sup>3</sup>

243. In *Hollis v. Palmer*, in the English Court of Common Pleas,<sup>4</sup> it was sought to deprive the defendant of the defence of the statute, by a statement in the declaration, that the defendant had made payments of interest within six years. The plaintiff sued as an executor upon a promissory note given to the testator, and declared that the defendant had not paid the said note to the testator in his lifetime, or to the plaintiff since his death, *except* "interest on the said note, at the rate of £5 per cent from the day of the date of said note, up to a certain day within six years, next before the commencement of this suit," &c.; and that the interest so paid was paid to the testator in his lifetime. The argument in behalf of the plaintiff was, that the defendant's plea (that the cause of action did not accrue within six years) admitted interest to be due, which the plaintiff might recover independent of the principal, and that the plea did not answer the whole declaration. The court, however, held, that the claim for principal was the only cause of action set forth in the declaration, and that the interest, as an accessory to the principal, fails together with the principal,

<sup>1</sup> *Coffin v. Bucknam*, 3 Fairf. (Me.) 471. That entries made by persons deceased, against their interest, are admissible in evidence, the court cite *Warren v. Granville*, 2 Strange, 1129; *Higham v. Ridgway*, 10 East, 109; *Doe, dem. Ruce v. Robson*, 15 Ib. 82. In the last case, Lord Ellenborough says: "The ground upon which this evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it."

<sup>2</sup> *Adams v. Seitzenger*, 1 Serg. & Watts (Penn.), 248; *Haven v. Hathaway*, 2 App. (Me.) 845.

<sup>3</sup> *Howe v. Thompson*, 2 Fairf. (Me.) 152.

<sup>4</sup> *Hollis et ux. v. Palmer*, 2 Bing. N. C. 718, and 29 Eng. Com. Law, 464.

when the latter is barred ; that the payments of interest set forth are only *evidence* of a cause of action, and so the plea answered the only cause of action in the declaration.

244. The fact of part payment may be proved by the oral admission of the party, or by any proper evidence, as well as by an indorsement of payment, or other writing, if it be made to appear that it was made in reference to the demand in suit.<sup>1</sup> Where the evidence was that the defendant paid £10 to the plaintiff within six years, it was held by Parke, B., not sufficient evidence, under the circumstances, to go to the jury as payment on account of the particular debt sued for : “ For, to take the case out of the statute, it must be shown that the part payment was made on account of a larger debt, the principle on which it takes a case out of the statute being, that it admits a greater debt to be due. That is not necessarily established by the bare evidence that £10 was paid to the plaintiff by a third person on account of the defendant. Next, it must be shown to have been a payment in part discharge of the particular debt sued for, but there was here no proof of the application of the £10 to such a purpose. It was said, as there was no evidence of any other debt due from the defendant to the plaintiff, the jury might be warranted in concluding the £10 to have been paid on account of this debt ; but it did appear that it was a payment on account, and not of a balance, nor was any acknowledgment made at the time of such payment that a greater sum was due. Then, if from what passed at the time, it could be affirmed to have been a part payment of a pre-existing larger debt, it would take the case out of the statute ; but, in the absence of such proof, a new trial must be granted.”<sup>2</sup> In *Beltzhoover v. Yewell*, in Maryland,<sup>3</sup> it not appearing that the defendant, in making the payment in question, had in his contemplation the items against which the statute had run, the court could not so apply the payment as to bring the whole account out of the statute.<sup>4</sup>

<sup>1</sup> *Read v. Hurst*, 7 Wend. (N. Y.) 408.

<sup>2</sup> In the former trial the plaintiff had a verdict, Vaughn, B., being of opinion that, if the jury should think the payment applicable to the particular debt sued for, it was sufficient evidence of a new promise to sustain the action. *Tippets v. Heane*, 2 Tyrw. (Exch.) 772.

<sup>3</sup> *Beltzhoover v. Yewell*, 11 Gill & Johns. (Md.) 212.

<sup>4</sup> See *ante*, Ch. XIV. on Mutual Accounts. And *Waters v. Thompson*, 2 Crompt. Mees. & Ros. (Exch.) 728. [*Vaughan v. Hankinson*, 85 N. J. (Law) 79. And see *ante*, § 238. The plaintiff had an account against the defendant, for the payment

245. It was held by Lord Ellenborough, in *Holmes v. Green*,<sup>1</sup> that in order to take a case out of the statute, in an action on a promissory note, it is not sufficient to show a payment by a joint maker of the note within six years, so as to throw it upon the defendant to show that the payment was not made on account of the note. But the question in the case was as to the application of the payment. It was contended, that the payment must be appropriated to the claim in question, unless it could be shown by the defendant that some other account existed between the parties. The learned judge said: "There would be no such thing as the statute of limitations, if this doctrine were to prevail: an acknowledgment to bind a partner ought to be clear and distinct; this would be an extravagant extension of the case of *Whitcomb v. Whiting*."

of a portion of which a third person was liable to the defendants. Within a year before the commencement of the action, one of the defendants, together with the plaintiff and such third person, examined the plaintiff's account, and no objection was made to any portion of it, and the items for which the third person was holden were selected and paid for, and credit was given by the plaintiff for the payment on account. This was held sufficient to take the case out of the statute. *Sanderson v. Milton Stage Co.*, 18 Vt. (8 Washb. 6) 107. And where the creditor holds several notes, and the debtor makes a general payment on account of the debt for which they were given, this implies a promise of further payment. And if the debtor fails to direct to which note the payment shall be applied, the creditor may apply it to whichever one he pleases, whereby the note to which he applies it will be taken out of the operation of the statute; but he cannot divide the sum and appropriate part on each note so as to take them all out of the statute. *Ayer v. Hawkins*, 19 Vt. (4 Washb.) 26. But in *Burn v. Bolton* (15 Law Jour. [N. S.] C. B. 97), Tindal, C. J., said that, "if two admitted demands were due at the time of the part payment, so that it was doubtful to which demand the payment applied, such a payment would not take either demand out of the statute." And see *Burr v. Burr*, 26 Penn. St. 284; *Armistead v. Brooks*, 18 Ark. 521. If there are three notes, two of which are barred, and a sum of money be paid on account of interest generally, but less than the amount of interest due on the note not barred, the payment will prevent the running of the statute on the latter note. *Nash v. Hodgson*, 81 Eng. L. & Eq. 555. But if applied on the others, it will not take them out of the statute. *Pond v. Williams*, 1 Gray (Mass.), 680; *Lowery v. Gear*, 82 Ill. 882. When an account is presented and examined, part payment on account generally, without designating any particular items, or excepting to any, saves the whole account from the operation of the statute. *Dyer v. Walker*, 54 Me. 18; *Peck v. N. Y. Steamship Co.*, 5 Bosw. (N. Y.) 226. So if the debt is payable by instalments, and all are due. *Nesom v. D'Armand*, 13 La. An. 294. So if payments are made generally on account of several notes, before the statute has run against either, the application to any one will prevent the bar of the statute, and when so applied will take effect from the time of payment. *Ramsay v. Warner*, 97 Mass. 8.]

<sup>1</sup> *Holmes v. Green*, 1 Stark. 488.

246. It matters not to whom the part payment may be made. If paid to an agent, or even to a person not authorized to receive it, but appearing to be so, it amounts to an acknowledgment. Thus, in *Clarke v. Hooper*,<sup>1</sup> it was observed by Tindal, Ch. J.: "In this case the statute of limitations has been pleaded to an action on a promissory note, and the plaintiff has proved payment of principal and interest within six years; not indeed to one who had a rightful title to receive it, but who, having letters of administration, would appear, at least, to stand in that situation. *In the mind* of the party paying, such a payment must have been a direct acknowledgment and admission of the debt, and is the same thing, in effect, as if he had written in a letter to a third person that he still owed the sum in question."

247. If it be agreed between debtor and creditor, that the latter shall receive goods in reduction of his demand, the delivery of the goods operates as a partial payment.<sup>2</sup> But where the goods are to be sold, and the proceeds appropriated in part extinguishment of the debt, the goods must be sold, and credit given for the proceeds in a reasonable time. Where the maker of a promissory note delivered goods to the holder to be sold, and the proceeds appropriated towards the payment of the note, it was held, that if such sale is made, and the proceeds indorsed upon the note, within a reasonable time, it is to be considered, in reference to the statute of limitations, as a payment made by the maker's order. But if the holder, without any assent on the part of the maker, or any notice to him, makes the sale and indorsement after a reasonable time has elapsed, it will not take the note out of the statute.<sup>3</sup> So, in an action upon a note payable more than six years before the commencement of the suit, it was held, that where the defendant had delivered another note to the plaintiff "to collect the same, and apply the proceeds to the payment of the note in suit," and

<sup>1</sup> *Clarke v. Hooper*, 1 Bing. 480. See also *Meggison v. Harper*, 4 Tyrw. (Ex.) 94, in which the decision was upon the like ground. And also *Pease v. Hirst*, 10 Barn. & Cres. 122, and 21 Eng. Com. Law, 88. [And see *post*, § 269. It seems that since the Stat. 9 Geo. IV. c. 14, an acknowledgment made to a stranger would not be sufficient. *Grenfell v. Girdleston*, 2 Y. & Coll. 662.]

<sup>2</sup> *Hooper v. Stevens*, 4 Adol. & Ell. 71; *Hart v. Nash*, 2 Crompt. Mees. & Welsb. (Exch.) 837. [*Sibley v. Lambert*, 30 Me. 253; *Butts v. Perkins*, 41 Barb. (N. Y.) 509. So if work is performed from time to time in payment of a debt, and the account is stated by the parties, the payment is from the statement, and not from the several periods at which the work was done. *Borden v. Peay*, 20 Ark. 298.]

<sup>3</sup> *Porter v. Blood*, 5 Pick. (Mass.) 54.



the plaintiff had accepted it, that he was bound to comply with these directions; and that as soon as he collected the money upon it, he was obliged to consider it a payment of so much of the note in suit; and that proof of a payment on the collateral note would operate as proof of payment of the same sum on the note in suit. But in such case, if the plaintiff has not used that reasonable diligence which the law requires to collect the collateral note, and the payments have been made later than they should have been, they cannot be considered as made by order of the defendants.<sup>1</sup>

<sup>1</sup> *Haven v. Hathaway*, 2 App. (Me.) 845, recognizing *Porter v. Blood*, *supra*. [So, a bill of exchange, delivered on account of a larger sum due with interest to pay part, will take the remainder out of the statute, from the time of the delivery, though the bill at maturity be dishonored. *Turney v. Dedwell*, 24 Eng. L. & Eq. 92. But if delivered as collateral, the proceeds to be applied in payment, the receipt of a dividend on the note takes it out of the operation of the statute from the time of the receipt. *Whipple v. Blackington*, 97 Mass. 476. A check is no advance of money until paid. *Garden v. Bruce*, Law Rep. 8 C. P. 300. And the maintenance of a child was held part payment of a note, the amount having been indorsed by the mother on the note in lieu of interest. *Badger v. Arch*, 28 Eng. L. & Eq. 464. But it was recently held, in Alabama, that the deposit, by the maker of a promissory note, with the assent of sureties, of cotton, with the agreement that its proceeds when sold should be applied in payment of the note, did not withdraw the note from the operation of the statute of limitations, although the cotton was sold and the proceeds applied in payment, after the maturity of the note, and within six years before the commencement of suit. *Lyon v. State Bank*, 12 Ala. 508.]

A partial payment on a witnessed note takes the note out of the statute for twenty years from the time of the payment. *Estes v. Blake* (80 Me.), 17 Shep. 164.

Whether the part payment, or an acknowledgment, will take a bond out of the statute, the authorities do not agree. Thus, where the obligor of a bond, with a full knowledge of his legal rights, admits his liability after the bond is barred, the admission revives the obligation. *Tillet v. Commonwealth*, 9 B. Mon. (Ky.) 438. So the payment of interest on a bond by one of the sureties before the statute of limitations attaches takes the debt out of the operation of the statute as to all. (*McBride, J., dissente.*) *Crage v. Callaway, &c.*, 12 Miss. 94; *Hartman v. Sharp*, 51 Mo. 29. See also *Amistead v. Brook*, 18 Ark. 521. But in Alabama it has been held that a verbal acknowledgment by the obligor will not prevent the statute from running against a bond, nor revive the remedy after the statute has become a bar. *Crawford v. Childress*, 1 Ala. (n. s.) 482.

The replication of a new promise to a plea of the statute of limitations in a suit on a former judgment is bad; such a replication is good only in actions on promises. *Taylor v. Spicey*, 11 Ired. (N. C.) 427. But in *Carshore v. Huyck*, 6 Barb. (N. Y.) 588, the court felt bound to sustain such a replication to a plea of the statute in an action on a justice's judgment, for reasons peculiar to the law of New York, as appears by the following extract from the opinion of Harris, J.: "The principal, and, I think, the only question in this case is whether, after a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment as that an action of debt may be maintained upon it. . . . The plaintiffs maintain the



affirmative of the proposition. . . . The defendant contends that a promise to pay a judgment cannot entitle the plaintiff in that judgment to maintain an action upon it as a subsisting cause of action ; that a judgment once barred by the statute of limitations cannot have its vitality restored by a new promise to pay. The question is not without its difficulty, and neither party is without eminent authority to sustain his position. It seems, however, to be settled against the defendant in this State. Upon a full examination of the cases in which the subject has been discussed, I am satisfied that, at least in this State, the doctrine is too firmly established to be again unsettled, that, when the operation of the statute of limitations is avoided by a new promise, the *old demand*, and not the *new promise*, is to be the foundation of the action. I confess that, were I at liberty to reason upon the question, the inclination of my mind would be to the other side of the question. The doctrine rests for its support upon a distinction between the cause of action itself and the remedy. The distinction is too thin and subtle to be received with satisfaction. An existing continuing cause of action, without any remedy to enforce it, is, to my mind, a mere abstraction. To say that a man has a cause of action left, after he has lost, by the operation of the statute, his remedy upon it, seems to me little less absurd than to say, I still have my property after I have actually lost it. If a debtor obtain a discharge under an insolvent act, a subsequent promise to pay the debt is regarded as a *new contract*, supported, it is true, by the pre-existing moral obligation, as a consideration for the new promise, but to be enforced as a new contract, and, like every other contract, according to its own terms. The reasonableness of this doctrine is much more manifest, at least to my mind, than that which has been established in this State in respect to the revival of debts barred by the statute of limitations. The best defence of the latter doctrine with which I have met is contained in the opinion of Mr. Justice Marcy, in *Dean v. Hewett* (5 Wend. 257). His argument is, that the new promise rebuts the presumption of payment upon which the statute of limitations proceeds, and has the same effect in keeping alive the remedy, whether made *before* or *after* the statute attaches. I am unable to perceive the conclusiveness of this reasoning. In the one case, the new promise, made before the statute has barred the debt, arrests its course, and a new starting point is made, from which it again commences to run. It cannot be said, in that case, that the new promise *revives* the debt, for it never was extinct. But, when the statute has once attached, the debt is *in fact*, however it may be in theory, extinct. It has lost all its vitality. If, afterwards, it has any 'legal use or validity,' it is through the reanimating principle of the new promise. And it is only useful for this purpose, as furnishing, by virtue of its continuing moral obligation, a sufficient consideration for the promise." And upon these grounds the court saw no reason why a new promise should not revive a judgment as well as a promissory note.

In Ohio, an acknowledgment of a debt, or part payment, or promise to pay *after* the debt has been barred by statute, will not *revive* the debt. *Hill v. Henry*, 17 Ohio, 9. And see Appendix CXXII. And some of the cases in other States would seem to recognize the distinction. "The general rule as I now consider it settled," says Shaw, C. J., in giving the judgment of the court, in *Sigourney v. Drury*, "is that to avoid the operation of the statute, it must be shown that the defendant promised within six years next before the commencement of the suit, and if it appear that more than six years have elapsed since the making of the original promise, or since the cause of action thereon accrued, it must appear that the defendant has made a new promise to pay within the six years." 14 Pick. (Mass.) 387. See also *Deshler v. Cabiness*, 10 Ala. 959 ; *Davidson v. Morris*, 5 S. & M. (Miss.) 564 ; *Van Keuren v. Parmelee*, 2 Comst. (N. Y.) 523, cited in note to § 260, *post* ; *Carshore v. Huyck*, 6 Barb. (N. Y.) Sup. Ct. 588, cited *supra* ; *Peyton v. Minor*, 11 S. & M. (Miss.) 148 ; *Brewster v. Hardeman*, *Dudley* (Ala.) 138 ; *Mason v. Howell*, 14 Ark. 199 ; *Esselstyn*

*v. Weeks*, 2 Kernan (N. Y.), 685; *Deloach v. Turner*, 7 Rich. (S. C.) Law, 143; *Shackleford v. Douglass*, 81 Miss. (2 George) 95; *Briscoe v. Anketell*, 28 Miss. (6 Cush.) 361; *Levisstones v. Mavigny*, 18 La. An. 858. But other cases hold, or seem to imply, that there is nothing in the distinction. *Wheelock v. Doolittle*, 18 Vt. 440; *Carlton v. Ludlow*, 1 Wms. (Vt.) 496; *Trustees, &c. v. Osgood*, 8 Shep. (Me.) 176; *Watson v. Robinson*, 5 Ired. (N. C.) 841; *Coles v. Kelsey*, 2 Texas, 501; *Hunter v. Starkes*, 8 Humph. (Tenn.) 656; *Yaw v. Kerr*, 11 Wright (Penn.), 333. And in *Farley v. Kustenbader*, 3 Barr (Penn.), 418, it is made a question whether a new promise, before the statute has run, is supported by a sufficient consideration. And *Case v. Cushman*, 1 Barr (Penn.), 246, was cited as an authority. But in *Hazelbacker v. Reeves*, 9 Barr (Penn.), 258, *Case v. Cushman* was overruled, and it was held that a new promise before the statute has run is supported by a sufficient consideration.

The cases also differ as to the effect of a promise not to take advantage of the statute of limitations. It was held to be equivalent to an acknowledgment in *Burton v. Stevens*, 24 Vt. (1 Deane) 131; *Noyes v. Hall*, 28 Vt. (2 Wms.) 645; *Stearns v. Stearns*, 82 Vt. 678; and in *Webber v. President, &c., of Williams College*, 23 Pick. (Mass.) 302. And see also *Emmons v. Hayward*, 6 Cush. (Mass.) 501, cited *ante*, note to § 115; and *Rackham v. Marriott*, 37 Eng. Law & Eq. 460; *Randon v. Tobey*, 11 How. (U. S.) 493; *Utica Ins. Co. v. Bloodgood*, 4 Wend. 652. Otherwise in Maine, *Warren v. Walker*, 10 Shep. (Me.) 458. And in Pennsylvania and Maryland. *Marseilles v. Kenton*, 17 Penn. St. 238; *Stockett v. Sasscer*, 8 Md. 374. And in Virginia, *Sutton v. Burness*, 9 Leigh, 381. But such an agreement will preclude the defendant from pleading the statute. As a covenant not to sue is tantamount to a release of the claim, so an agreement not to defend a particular ground is tantamount to a release of all benefit to be derived from that ground. *Ibid.* It is not pleadable under the issue of *non assumpsit infra*, &c. *Cowart v. Perrine*, 21 N. J. (Eq.) 101. And see also, s. c. 8 Green (N. J.), 454; *Hodgdon v. Chase*, 29 Me. (16 Shep.) 47. And so is the law of France. "Prescription cannot be renounced in advance, but only after it is acquired." *Code Civil Expliqué*, Art. 2220. If prescription could be renounced before it is acquired, it is there said a renunciation may become a formal part of every contract, and thus the object of the law would be completely frustrated. *Ibid*, note. It seems that an action will lie for the breach of an agreement not to take advantage of the statute. *East India Co. v. Paul*, 1 Eng. Law & Eq. 44; *Bank of Penn. v. Hill*, 10 Humph. (Tenn.) 176. In *Hodgdon v. Chase*, 32 Me. (2 Red.) 169, it was, however, expressly held that an action would not lie in such a case, as it would render the statute inoperative. A promise before the debt is barred, to extend the time beyond the limitation without any new consideration, is void. *Price v. Price*, 34 Iowa, 404. In Nevada part payment does not revive the statute. *Taylor v. Hendrie*, 8 Nev. 243.

## CHAPTER XXIII.

## ACKNOWLEDGMENT BY ONE OF SEVERAL CO-CONTRACTORS.

248. As a general rule, it is well settled, that, if several persons, whether regular copartners in trade or not, be jointly indebted, the unambiguous and unqualified acknowledgment of one of them, owing to the community of interest and design between them, and the consequent implied authority which one has to bind his co-contractor or co-contractors, will avoid the bar of the statute as to all. The doctrine is stated by Lord Ellenborough to have had its origin with the case of *Whitcomb v. Whiting*,<sup>1</sup> decided in the King's Bench in 1781.<sup>2</sup> In that case, there was a partial payment

<sup>1</sup> *Whitcomb v. Whiting*, 2 Doug. 652.

<sup>2</sup> Much of the argument, says Emery, J., in giving the opinion of the court, in *Pike v. Warren*, in Maine (8 Shep. Me. 899), in behalf of the defendant, has been devoted to assailing the decision of *Whitcomb v. Whiting*; and a similar attack, he said, was made upon the law of this case in *Atkins v. Tredgold* (2 Barnw. & Cress. 28); and he adds, that it is a little curious, that, in *Perham v. Raynal* (2 Bing. 806, as reported in 9 Eng. Com. Law 418), the authority of *Whitcomb v. Whiting*, is reinstated, and held to contain sound doctrine, so far that an acknowledgment within six years, by one of two makers of a joint and several note, revives the debt against both, though the other had signed the note as surety. In *Perham v. Raynal*, referred to by the learned judge, it appears that Chief Justice Best says, that two of the judges, in *Atkins v. Tredgold*, have thrown out *dicta* impugning the authority of *Whitcomb v. Whiting*; but the expressions are only *dicta*, and the two other judges abstain from saying any thing to the same effect. He also says, that it is important to look to what Abbott, Ch. J., told the jury, namely: "If they thought that the payments made by Robert Tredgold were made by him in his character of executor, they should find for the plaintiffs on those counts. If, however, they thought the payments made by him on his own account, as the joint maker of the notes, then they were to find for the defendants." So that, at that time, says Chief Justice Best, he (Abbott, Ch. J.) thought the doctrine in *Whitcomb v. Whiting* correct, because he charged the jury in conformity therewith. Best, Ch. J., then states that Lord Ellenborough and Bayley, J., express approbation, and admit the authority of *Whitcomb v. Whiting*, in *Brandram v. Wharton* (1 Barn. & Ald. 458). It seems, therefore, he continues, that the decision in *Whitcomb v. Whiting* rests on the same principle as decisions with respect to admissions by one of several persons concerned in other instances; that we should create an anomaly by departing from it; and that it has been confirmed in many cases, and not shaken by any authority. In reply to doubts expressed as to the authority of *Whitcomb v. Whiting*, by Shaw, Ch. J., in *Sigourney v. Drury*, in the Supreme Court of Massachusetts (14 Pick. 887), *Whit-*

made by one of several promisors on a joint and several promissory note, executed by the defendant and three others; and the proof of such payment, it was held, took the case out of the statute, as regarded the defendant. Baron Hotham considering it sufficient to take the case out of the statute, and so was binding upon the defendant, a verdict was found for the plaintiff. Upon motion for a new trial, Lord Mansfield said: "Payment by one is payment for all, the one acting virtually as agent for the rest; and, in the same manner, an admission by one is an admission by all; and the law raises a promise to pay when the debt is admitted to be due." In a modern case, in England, the law is thus laid

man, Ch. J., in giving the opinion of the Supreme Court, in *Maine, in Dinsmore v. Dinsmore*, 8 Shep. (Me.) 488, says: "His doubts would seem to have been suggested by what fell from Mr. Justice Bayley, in *Atkins v. Tredgold*, 2 Barn. & Cress. 23. That cause, however, was not decided on any such ground; and the language of the learned judge was an *obiter dictum*. The question there was, whether a payment of interest, by a surviving co-promisor, revived a debt against the executors of the deceased promisors; and it was held, that it did not, as the death of one rendered the contract several against the survivor." [But see *post*, § 260, note.]

In a number of instances, it has been asserted that *Whitcomb v. Whiting* was contrary to the authority of *Bland v. Haselrig*, (2 Ventris, 152). In *White v. Hale*, in Massachusetts (8 Pick. 293), Chief Justice Parker, in giving the opinion of the court, said, that the case in Ventris was against four, all of whom pleaded the statute, and the jury found that, where one promised within six years, there can be no judgment against him. This is because the verdict does not pursue the issue. The fault was in not considering the promise of one binding upon all. This is explained in a note to the case cited from Douglas (*Whitcomb v. Whiting*). Chief Justice Best, in *Perham v. Raynall* (2 Bing. 306, *supra*), says, *Bland v. Haselrig* ought not to have weight, for one of the judges differed, and other circumstances show it to be a case of no authority. As is well observed, he says of this case, by Lord Glenbervie, who is now authority, in a note to his own report of *Whitcomb v. Whiting*, it "may be explained on the manner of the finding; for, as the plea was *joint*, and the replication must have alleged a *joint undertaking*, the verdict did not find what the plaintiff had bound himself to prove." Pollexfen, Ch. J., and Powell and Rokeby, JJ., were of opinion that the plaintiff could not have judgment. Ventris inclined to the contrary. He considered it as a promise, which the case in Carthew shows it was not. But the Chief Justice seemed of opinion, "if the promise were renewed within six years, yet, if not upon a new consideration, the action will lie against him, that he promised alone." "*Sed quære*, for the common practice is, upon the plea of the statute of limitations, to prove only a renewing of the promise, without any further consideration; but the barely owning the debt is not sufficient." That case, says Best, Ch. J., cannot be considered law at present; and, with deference to Pollexfen, a moral obligation to pay the debt was a sufficient consideration for the promise. The decision, therefore, was erroneous, except that the verdict found precluded any other judgment. But Judge Story thinks it very doubtful, upon a critical examination of the report, whether the opinion of the court, or of any of the judges, proceeded solely upon such a ground. Story on Partnership, 463, note.

down by Lord Chief Justice Tenterden: "I am of opinion that a part payment by one is an admission by both that the note is unsatisfied, and that it operates as a promise by both to pay according to the nature of the instrument." Holroyd, J., in the same case, referring to the part payment on the note in question, considered that it was made by B., as the agent, and by the authority of the other joint and several promisors, and was therefore an admission, by the latter, that the sum remaining due on the note was an existing debt, and it operated as a fresh promise by him to pay the same.<sup>1</sup> In this country, the proposition is broadly stated judicially: "It is very clear that, if several persons, whether in partnership or not, are jointly indebted, the explicit acknowledgment of one of them, who is still liable himself, of the existing indebtedness, or a new promise by him, will take the case out of the statute as to all."<sup>2</sup> Lord Chancellor Brougham recognized, in the most explicit manner, the authority of *Whitcomb v. Whiting*, in *Pritchard v. Draper*,<sup>3</sup> and, in reference to it, asserted: "Before Lord Tenterden's act, if two persons made a joint promissory note, and six years ran before an action was brought, an acknowledgment of liability by one of those persons was sufficient to take the case out of the statute of limitations, although made respecting a fact which took place long after the connection of the parties had ceased." And so firmly settled, he said, was the law on this point, that, to alter it, an express clause had been inserted in Lord Tenterden's act. Independent of the enactment in Massachusetts (that, if there be two or more joint contractors, no one of them shall lose the benefit of the limitation act, so as to be chargeable by reason only of any payment made by any other of them), where a minor makes a payment on a joint note given by him and an adult, and, after he comes of age, makes

<sup>1</sup> *Burleigh, Ex'r, v. Stott*, 8 Barn. & Cress. 86. See also other English cases: *Clarke v. Hooper*, 10 Bing. 480; *Pease v. Hirst*, 10 Barn. & Cress. 122; *Manderston v. Robertson*, 4 Man. & Ryl. 410; *Channel v. Ditchburn*, 5 Mees. & Welsb. (Ex.) 494.

<sup>2</sup> Mellen, Ch. J., in delivering the opinion of the court, in *Getchell v. Head*, 7 Greenl. (Me.) 26. See also *Clementson v. Williams*, 8 Cranch (U. S.), 72; *Pike v. Warren*, 8 Shep. (Me.) 390; *Dinsmore v. Dinsmore*, 8 Ib. 438; *Smith v. Ludlow*, 6 Johns. (N. Y.) 267; *Johnson v. Beardsley*, 15 Ib. 3; *Beitz v. Fuller*, 1 M'Cord (S. C.), 541; *Sigourney v. Drury*, 14 Pick. (Mass.) 887; *White v. Hale*, 3 Ib. 291; *Sigourney v. Wetherell*, 6 Met. (Mass.) 538; *Shelton v. Cocke*, 8 Munf. (Va.) 191; Story on Part. 160.

<sup>3</sup> *Pritchard v. Draper*, 1 Russ. & Mylne, Ch. 191.

an oral promise to pay the balance, he thereby so ratifies his former payment that it will take the note out of the statute, both as to himself and as to the adult.<sup>1</sup> Chief Justice Shaw, it is true, in *Sigourney v. Drury*,<sup>2</sup> in the course of his reasoning, has suggested that, if the *admission were merely oral*, or *after the six years had elapsed*, so that the statute had become a bar, it would deserve consideration whether it should be allowed to revive the promise against both, and seems to be inclined to think it would not; but reserves himself for the consideration of those questions when they shall require a decision.<sup>3</sup>

249. Whether the contract be joint, or joint and several, makes no difference, for there may be a joint debt, though there is a several promise by each to pay it.<sup>4</sup> But it is as much necessary to show that the party making the promise, though he is not sued, nor his liability denied, is a co-contractor, as it would be if he were a party to the action.<sup>5</sup> Though one of the promisors of a joint and several promissory note is designated as principal, and the others as *sureties*, the designation, in the words of Chief Justice Shaw, "is rather intended to indicate the relation in which the promisors stand to each other, than to affect their obligation to the promisee. It is intended to enable the surety to have his remedy over, if called on to pay and to protect him from a claim for contribution, if the payment is made by the principal."<sup>6</sup> In an action of assumpsit upon a promissory note signed by J. E., one of the defendants, as principal, and S. W., the other defendant, as surety, payable to the plaintiff's testator on demand with interest, the defence was, that, as twenty years had elapsed after the date of the note before the commencement of the action, the legal presumption was, that it had been paid. A payment of fifty

<sup>1</sup> *Pierce v. Toby*, 5 Met. (Mass.) 168.

<sup>2</sup> 14 Pick. (Mass.) 387. And see opinion of Brooke, J., in *Farmers' Bank v. Clarke*, 4 Leigh (Va.), 603.

<sup>3</sup> From which Whitman, Ch. J., in *Dinsmore v. Dinsmore*, 8 Shep. (Me.) 438, expressly dissented.

<sup>4</sup> *Burleigh v. Stott*, 8 Barn. & Cress. 86, and 15 Eng. Com. Law, 151. When several persons are bound by a joint, or joint and several obligation, the unqualified release of one of the obligors will operate as a discharge to all of them. *Bronson v. Fitzhugh*, 1 Hill (N. Y.), 185; but where the obligors are bound only severally, the case does not come within the rule, and the release of one will not discharge the rest. *Bank of Poughkeepsie v. Ibbotsom*, Ib. 461. And see 2 Saund. 574, Bac. Abr. T. *Release* (G.) 7th Lond. ed.

<sup>5</sup> *Wylde v. Porter*, 1 Adol. & Ell. 742, and 20 Com. Law, 196.

<sup>6</sup> *Sigourney v. Drury*, 14 Pick. (Mass.) 387.



dollars the court held to be equivalent to an express acknowledgment of an existing debt, and that the principal and surety stood upon the same footing. The contract, the court said, being proved, the admission of one was the admission of both. But if there had been any proof of collusion between the creditor and the principal, to throw the debt on the surety, and to deprive him of his indemnity, without doubt he would be entitled to relief.<sup>1</sup> Another ground of defence in behalf of the surety was the long delay of the creditor to proceed against the principal, until the latter became insolvent. And it was argued, that the prolongation of credit had been the means of depriving the surety of his indemnity, and ought, therefore, to absolve him from liability. But the court considered the principle well settled, that the mere delay of the creditor to proceed against the principal was not sufficient to discharge the surety; and that, in the cases cited by the defendant's counsel,<sup>2</sup> it appeared that the creditor was requested by the surety to proceed against the principal.<sup>3</sup> Most of the English cases upon the subject were those of sureties. In *Perham v. Raynal*,<sup>4</sup> an acknowledgment of one of two makers of a joint and several promissory note was held sufficient to avoid the statute as against the other, although the other had made no acknowledgment within six years, and had signed the note only as surety.<sup>5</sup> One N., having applied to D. for a loan of £300, a certain sum on mortgage, D., doubting the sufficiency of the security, refused to advance it without having, in addition, a joint and several promissory note for £50, from N. and one F., payable on demand. The note and mortgage were accordingly given, the latter containing a covenant by N. to pay the sum of £300, and interest at five per cent. Several half-yearly payments of £7 10s. each, for interest, having been made by N., it was held, in an action against F. on the note, that such payments by N. kept all the securities alive, and prevented the operation of the statute as to the note.<sup>6</sup> Why

<sup>1</sup> When cases of fraud appear, they will be determined by their own circumstances. Per Lord Mansfield, in *Whitcomb v. Whiting*, *supra*.

<sup>2</sup> *Pain v. Packard*, 18 Johns. (N. Y.) 174; *King v. Baldwin*, 17 Ib. 890.

<sup>3</sup> *Hunt v. Bridgham*, 2 Pick. (Mass.) 581.

<sup>4</sup> *Perham v. Raynal*, 9 Moore, 566; and 3 Bing. 806; and 15 Eng. Com. Law, 413.

<sup>5</sup> See also *Evans's Pothier*, 418.

<sup>6</sup> *Dowling et al. Ex'rs v. Ford*, 11 Mees. & Welsb. (Exch.) 828.



should the circumstance that one of the co-contractors is a surety, asks Chief Justice Shaw, make any difference? "If the holder gives no new credit to the principal, it is always in the power of the surety to inquire and ascertain whether the debt is paid, and if not satisfied to let the note remain unpaid, he may pay it, and call on his principal for reimbursement. But if he be content to lie by, and make no inquiry, where is the hardship in calling upon him to perform the contract which he has made? When a note is given with a surety, it indicates that the promisee wishes and means to have security; it indicates that it is intended for the accommodation of the principal; and, with the view to such accommodation, it may reasonably be expected that it will continue beyond the particular time stipulated; and the law binds all parties till payment. If the surety does not mean to remain responsible beyond the precise time limited, he may put his suretyship into the form of an indorsement, and then if the note is not paid at maturity, he will know it or be discharged."<sup>1</sup>

250. But it is evident that a payment made by one of several liable *alieno jure*, cannot raise an implied promise by them all, and that where the relationship of the parties to a contract is collateral, and there is no *aggregatio mentium*, neither can vary or affect the liability of the other. Where the maker of a promissory note of more than six years' standing died insolvent, he and a guarantor of the note, it was held, were never jointly liable; and the undertaking of the guarantor being independent of, and collateral to, that of the maker, the allowance by him as a commissioner, of the maker's note after his decease as a valid claim against the estate, implied no promise to pay the debt.<sup>2</sup> Both maker and guarantor stand equally independent to each other. If A guarantees to B the performance of any contract he may make with C, and six years elapse after the contract between B and C, and before the bringing of suit against A upon his guaranty, no acknowledgment by C subsequent to the contract can take the case out of the statute as to A. A made an engagement by himself, and was in no kind of *partnership*.<sup>3</sup> There can be no question that a party attempted to be charged as the indorser of a negotiable note may be pro-

<sup>1</sup> Per Shaw, Ch. J., in *Sigourney v. Drury*, 14 Pick. (Mass.) 387.

<sup>2</sup> *Gardiner v. Nutting*, 5 Greenl. (Me.) 140.

<sup>3</sup> *Meade v. M'Dowell*, 5 Binn. (Penn.) 195.

tected by the statute, notwithstanding the maker may have made even a direct and positive promise, within six years, to pay the same.<sup>1</sup> And it has been held expressly, that where an acknowledgment was made by an accommodation acceptor, within six years, of his liability to the payee, it was insufficient to deprive the drawer from the protection of the statute.<sup>2</sup> It has been considered an extravagant extension of the general rule to make a mere payment of a sum of money to the indorsee of a note, by one of two joint makers, sufficient to render the other liable, as the money might have been paid on some other account. The other party must expressly acknowledge the payment on account of the note.<sup>3</sup>

251. Where the community of interest has been severed by the death of one joint contractor, his executors or administrators cannot be made liable, after the lapse of six years, by an admission or part payment of the demand by the surviving co-debtors. If they could, says Chief Justice Abbott, it would be a doctrine which would introduce great difficulty in administering the affairs of testators. "Suppose," says he, "an executor to have waited six years, and then, no claim having been made, to dispose of the assets in payment of legacies. He might, if the plaintiffs were to prevail, be subsequently rendered liable to the payment of demands to any amount, by the acknowledgment of a person originally joint debtor with the testator."<sup>4</sup> Accordingly, it was decided in the case here referred to, where A and B were the joint and several makers of a promissory note, and A died, and, ten years after his death, B paid interest on the note, and no action was brought thereon against the executors of A, the payment by B did not make the executors liable. At the time when the payment was made by B, the joint contract had ceased to exist, for it was determined by the death of A; and the note then became the several note of the parties to it. To hold, therefore, such a payment to be an implied promise sufficient to bind the defendants, would be to hold that, when the promises are several, a promise by one should bind the rest.<sup>5</sup>

<sup>1</sup> By the court, *semble*, in *Gardiner v. Nutting*, *supra*.

<sup>2</sup> *Easterly v. Pullen*, 2 Stark. C. 186.

<sup>3</sup> *Holmes v. Green*, 1 Stark. C. 489.

<sup>4</sup> *Atkins et al. Ex'rs of Atkins v. Tredgold*, 2 Barn. & Cress. 23, and 9 Eng. Com. Law, 12.

<sup>5</sup> Per Holroyd, J., *Ib.*; *Fisher v. Tucker*, 1 M'Cord (S. C.), Ch. 171.

252. So, on the ground of a want of a subsisting community of interest, a partial payment, made within six years, by an executor or administrator of one of two promisors of a joint and several promissory note, will not take the note out of the statute, as against the surviving co-contractor. An administrator or executor may not know; and, if he does, he is not authorized, by virtue of his representation of the deceased, to revive a debt against the survivor. By the death of the deceased co-contractor, the joint contract has been severed, and hence the payment is made by one who has no interest in common.<sup>1</sup>

253. In *Jackson v. Fairbank*,<sup>2</sup> it was held, that the payment of dividends, under a commission of bankruptcy against one of several makers of a promissory note, revived the note as against the others. But this is evidently carrying the doctrine of rendering one original co-contractor liable by the acknowledgment or promise of the other, on the ground of a community of interest, too far, as that interest has been severed by the bankruptcy; the original debt might thus be kept continually on foot, while the party originally bound was wholly unconscious of any such continuing obligation, and was constantly denying the debt, and repelling every presumption of a promise by him to pay. It is going, as Chancellor Kent says, unreasonably far, to construe payments by assignees or trustees, who are not parties to the contract, or under any personal obligation to pay or contribute, as meaning more than they plainly import, or as carrying with them sufficient evidence of a renewed personal promise of the original debtor to pay. Such special trusts, says he, were not created for any such purpose; and it is perverting the intention of the parties, and is plainly repugnant to the reason and equity of the trust, to make the ordinary execution of the trust the ground of a constructive new assumption of the debt by the debtor.<sup>3</sup> Lord Eldon, in alluding to the case of *Jackson v. Fairbank*, said it could not be that a creditor, who could not, from the effect of the statute of limitations, maintain an action against a solvent partner, might, by forcing a dividend from the assignees of the bankrupt part-

<sup>1</sup> *Hathaway v. Haskell*, 9 Pick. (Mass.) 42; *Slater v. Lawson*, 1 Barn. & Adol. 896, and 20 Eng. Com. Law, 409.

<sup>2</sup> *Jackson v. Fairbank*, 2 H. Black. 840.

<sup>3</sup> *Roosevelt v. Mark*, 6 Johns. (N. Y.) Ch. 292.

ner, raise a new assumpsit, upon which he could sue the solvent partner.<sup>1</sup>

254. Lord Tenterden held, that where one of the defendants himself had acknowledged a debt after his discharge under the bankrupt law, it did not take the case out of the statute as to the other defendant.<sup>2</sup> If the defendant who so made the acknowledgment had been liable for the debt *at the time* he did so, it would have been altogether different.<sup>3</sup> Where a debt was originally contracted with J., W., & S.; S., more than six years afterwards, and within six years of the action being brought, made a payment in respect of it to the plaintiffs. S. became bankrupt shortly after; and the jury found that he made the payment in fraud of J. & W., and in expectation of immediate bankruptcy. It was held, that, nevertheless, the payment barred the operation of the statute.<sup>4</sup>

255. Whether the death of one partner is such a severance of the community of interest between him and his surviving partner, as the keeping alive of a partnership debt by the surviving partner will bind the representative of the deceased partner, against the statute of limitations, does not appear to have been expressly determined. The law is, that where the liability of one co-contractor is continued by partial payments within six years, but six years have elapsed without any payment by the other co-contractor, the debtor who has kept the demand alive, and has finally paid it, may recover a contribution of the other, within six years.<sup>5</sup> "When the simple case shall occur," says Lord Chancellor Cottenham, "of the representatives of a deceased partner setting up the statute of limitations against a claim of the creditor of the firm, it will be to be considered whether such a defence can prevail while the surviving partner continues liable, and the estate of the deceased partner continues liable to *contribution* at the suit of the surviving partner. If the equity of the creditor to go against the estate of the deceased partner is founded upon the equity of the surviving partner against that estate, it would seem

<sup>1</sup> Dewdney, *Ex parte*, 18 Ves. 499. See also *Brandram v. Wharton*, 1 Barn. & Ald. 458. [And see, *post*, § 260, note.]

<sup>2</sup> *Martin v. Bridges et al.*, 18 Car. & Payne, 88.

<sup>3</sup> *Burleigh v. Scott*, 8 Barn. & Cress. 86.

<sup>4</sup> *Goddard v. Ingraham*, 8 Q. B. 889, so cited in 1 Lond. Law Mag. (New Series) 69.

<sup>5</sup> *Peaslee, Adm'r, v. Breed*, 10 N. H. 489.

that the equity of the creditor ought not to be so barred, as long as the equity of the surviving partner continues, as that would be to create that circuitry which it is the object of the rule to prevent."<sup>1</sup>

256. There is an evident distinction between an acknowledgment made by a sole debtor, and one made by one of several debtors. In one case, an acknowledgment will be binding, and in the other it may not. As was said by the court, in *Cambridge v. Hobart*:<sup>2</sup> "In the case of a sole debtor, if the debt has been paid, it must have been paid by the defendant himself, and the fact must lie within his own knowledge; and, therefore, when he admits that he does not know that the debt has been paid, but presumes it has not, it might rightly be considered as strong evidence of the present existence of the debt. But when the same negative words are used by one of several debtors, who has not been called upon, and who, if in fact the debt had been paid by any of the other parties, would not be likely to know it, saying negatively that he did not know that it had been paid, would have very little tendency to rebut the presumption arising from lapse of time, that it had been paid." The court therefore held, that the admission of one promisor of a joint note, that he signed the note, and presumed that it was still due, was not sufficient to take the case out of the statute,—not amounting to an unqualified promise.

257. One of the many subjects arising under the statute of limitations, of great practical importance, which has given rise, in this country, to conflicting opinions and judgments, is that of the binding effect of an acknowledgment or new promise, made by one copartner after the dissolution of the firm upon the other copartners. In England, the law seems to have been very definitively settled upon the subject. *Wood v. Braddick*<sup>3</sup> has been a case often appealed to, in favor of the doctrine that, although, after the dissolution of a partnership, one partner cannot bind the others by a new contract, he may do so by confessions or acknowl-

<sup>1</sup> *Winter v. Innes*, 4 Mylne & Craig, Ch. 101 (2 Vict.). See also *Braithwaite v. Britain*, 1 Keen (Rolls Court), 226. When the community of interest is severed by the death of one joint contractor, an acknowledgment of the debt, or promise to pay it, by a co-contractor, will not bind the executor or administrator; nor that of the executor or administrator, the co-contractor. *Root v. Bradley*, 1 Kansas, 487.

<sup>2</sup> *Cambridge v. Hobart*, 10 Pick. (Mass.) 232.

<sup>3</sup> *Wood v. Braddick*, 1 Taunt. 104.

edgments of one entered into while the partnership connection subsisted. This doctrine has ever been maintained in England, in its application to the statute of limitations, until at least the statute of 9 Geo. IV. c. 14, commonly called "Lord Tenterden's Act." Lord Chancellor Brougham expressly held, in *Pritchard v. Draper*,<sup>1</sup> the declarations of one partner, as to a payment, made subsequently to the dissolution, of a debt due to the partnership, are admissible against the other partner. "The partnership," says he, "it is true, had ceased; but so, in *Whitcomb v. Whiting*, had the connection between the two makers of the promissory note."<sup>2</sup> A payment made by one copartner, after the dissolution of the partnership, on account of a partnership debt, and after six years have elapsed without any acknowledgment of the debt, is sufficient to take the case out of the operation of the statute as against the other partner, though the jury find that the payment was fraudulently made against his consent, and in concert with the creditor to revive the debt.<sup>3</sup>

258. The decision in *Cady v. Shepherd*, by the Supreme Court of Massachusetts,<sup>4</sup> corresponds with that above mentioned of Lord Brougham; and Wilde, J., in giving the opinion of the court, relies, as does Lord Brougham, upon *Wood v. Braddick*, the principle of which is, that the admission of one partner, made after the partnership connection has ceased, is no evidence to charge the other in any transaction which has occurred since their separation; but with respect to rights created during the *pendency* of the partnership, the power of the partners remains after dissolution. "The dissolution," says Wilde, J., "of the partnership does not discharge the partners from their liability on contracts made during the continuance of the partnership; all must be sued and a separate recovery cannot be had against any one of the partners. In respect, therefore, to such contracts and liabilities, it is immaterial whether the confessions of any one of the partners was made before or after the dissolution. Doubtless they may disprove the truth of such confessions; they may prove payment, or any other discharge of the claim, or that the contract or claim had never any legal validity. But that the confessions of any one of the defendants, in an action against several, on a joint contract

<sup>1</sup> *Pritchard v. Draper*, 1 Russ. & Mylne, Ch. 191.

<sup>2</sup> See, *ante*, § 248.

<sup>3</sup> *Goddard v. Ingram*, 3 Gale & Dav. 46. [But see, *post*, § 260, note.]

<sup>4</sup> *Cady v. Shepherd*, 11 Pick. (Mass.) 408.



may be given in evidence against them, the joint contract being first proved *aliunde*, cannot, we think, be reasonably doubted.”<sup>1</sup> Such is, also, the settled doctrine in Maine.<sup>2</sup> In Connecticut, it has been held, that the acknowledgment of one of two partners, after the dissolution, of a debt against the partnership, as just and still due, is admissible evidence in an action against both, to remove the bar of the statute, although such acknowledgment was made by the partner then insolvent.<sup>3</sup> Similar decisions have formerly been made in Virginia, with the qualification in *Wood v. Braddick*, and *Cady v. Shepherd*, that the acknowledgment is not evidence of the original partnership debt, which must be proved *aliunde*;<sup>4</sup> and, also, in South Carolina.<sup>5</sup>

259. On the other hand, there is a class of cases by no means small, and some of them entitled to the highest respect, which hold that a partnership debt, after the time limited by the statute has elapsed, no subsequent acknowledgment by one partner, made after the dissolution, will remove the bar of the statute.<sup>6</sup> The judgment in these cases is founded upon the now settled construction, that, after the statute has once operated upon a demand, nothing which does not amount to a *new promise* will revive it; and, in connection, upon the principle, that the moment a partnership ceases, the parties become distinct persons with respect to each other, and consequently no promise or engagement, by one of the former partners, can throw a new liability upon another of his former copartners. In reasoning upon the subject in this light, the Supreme Court of the United States enlarged very fully and forcibly (and decided agreeably to their reasoning), in *Bell v. Morrison*, just cited, by Mr. Justice Story, who gave the opinion of the court. Whether one partner, in the case in question, could bind the firm after its dissolution, the learned judge maintained, that

<sup>1</sup> See also *Tuttle v. Cooper*, 5 Pick. (Mass.) 414; *White v. Hall*, 8 Ib. 291. In *Van Reimsdyk v. Kane*, 1 Gall. (Cir. Co.) 680, the court recognize the doctrine of *Wood v. Braddick*.

<sup>2</sup> *Greenleaf v. Quincy*, 8 Fairf. (Me.) 11.

<sup>3</sup> *Austin v. Bostwick*, 9 Conn. 496; *Coit v. Tracy*, 8 Ib. 268.

<sup>4</sup> *Brockenbrough v. Huckley*, 6 Call (Va.), 51; *Shelton v. Cocke*, 8 Munf. (Va.) 191.

<sup>5</sup> *Simpson v. Geddes*, 2 Bay (S. C.), 533; *Fisher v. Tucker*, 1 M'Cord (S. C.) Ch. 169.

<sup>6</sup> *Searight v. Craighead*, 1 Penn. 135; *Levy v. Cadet*, 17 Serg. & Rawle (Penn.), 126; *Exeter Bank v. Sullivan*, 6 N. H. 124; *Yandes v. Le Favor*, 2 Blackf. (Ind.) 871; *Brewsler v. Hardman*, Dud. (Ga.) 138; *Belote v. Wynne*, 7 Yerg. (Tenn.) 534; *Bell v. Morrison*, 1 Peters (U. S.), 351.



the proper resolution of the point depended upon another, and that was, whether the acknowledgment or promise is to be deemed a mere *continuation of the original promise* or a *new contract*, springing out of, and supported by, the original consideration. And he thought, both upon principle and authority, it is the latter; and, if so, as, after the dissolution, no one partner can create a new contract binding upon the others, his acknowledgment is inoperative and void as to them. After reviewing the authorities, the light, he said, in which he was disposed to view the question was, that, after dissolution, no partner can create a cause of action against the other partners, except by a new authority for that purpose. When the statute of limitations, he maintained, had once run against a debt, the cause of action against the partnership was gone. The acknowledgment, if it is to operate at all, is to create a new cause of action; to revive a debt which is extinct; and thus to give an action which has its life from the new promise implied by law from such an acknowledgment. It was, in its essence, he said, the creation of a new right, and not the enforcement of an old one; and the power to create such a right did not exist, after a dissolution of a partnership in any partner.<sup>1</sup>

260. In New York, in *Smith v. Ludlow*,<sup>2</sup> the acknowledgment of one partner, after the dissolution, and after the statute had attached, was held sufficient to revive the debt against both; but it was on the ground of a special agency, as advertised in the gazette, delegated to the party making the acknowledgment, to settle the partnership concerns. Both before<sup>3</sup> and subsequently,<sup>4</sup> a contrary doctrine, as the general rule, has been laid down.<sup>5</sup>

<sup>1</sup> The learned judge, in his work on the Law of Partnership, admits that a contrary doctrine has been constantly maintained, as to partners, for a great length of time in England, "founded apparently upon a mere unreasoned decision in the time of Lord Mansfield." In truth, says the learned author, the whole controversy must ultimately turn upon the single point whether the acknowledgment is a mere continuation of the original promise, or whether it is a new contract or promise, springing out of, and supported by, the original consideration. And he adds, that it was upon the latter ground that the Supreme Court, in *Bell v. Morrison*, deemed the doctrine wholly untenable. Story on Part. 482, and extensive comments in note on same page.

<sup>2</sup> *Smith v. Ludlow*, 6 Johns. (N. Y.) 287, cited in *Hopkins v. Banks*, 6 Cow. (N. Y.) 650.

<sup>3</sup> *Hackley v. Patrick*, 8 Johns. (N. Y.) 528.

<sup>4</sup> *Waldren v. Sherburne*, 15 Ib. 424.

<sup>5</sup> [And more recent discussion, and more thorough consideration, in the English courts, have left but little if any vitality in *Whitcomb v. Whiting*, and *Jackson v.*

Fairbanks. See *Davies v. Edwards*, 6 Eng. Law & Eq. 520. And the courts of this country are gradually recovering from the errors into which they had been led by the authority of those leading English cases. In *Van Keuren v. Parmelee*, recently decided in the New York Court of Appeals, 2 Comst. (N. Y.) 528, Mr. Justice Bronson, in a very learned and vigorous judgment, denies that *Whitcomb v. Whiting* is law, and upon grounds which will doubtless be deemed to be perfectly satisfactory. The judgment is as follows:—

“The question is on the statute of limitations; and the case is shortly this: The plaintiff sues on a note made by three partners, on the first day of May, 1831, and payable immediately. The partnership was dissolved in the spring of 1832; the suit was commenced in July, 1847, more than sixteen years after the cause of action had accrued; and the jury find a promise by ‘John Van Keuren, one of the defendants,’ within six years before action brought; but they find no promise by either of the other defendants. The new promise by John Van Keuren was made more than nine years after the partnership was dissolved; and more than four years after an action upon the note had been barred by the statute of limitations. It cannot but strike every one with some degree of astonishment that the promise of one, made at such a time, and under such circumstances, should bind all of the defendants. But still the question must be considered upon authority; and if the rule has been so settled, it must be followed, whatever we may think of it as an original proposition.

“Before looking at the cases, I will inquire for a moment, how the matter stands upon principle. And, however much it may be out of the ordinary course, I will begin by referring to the statute. The words are: ‘the following actions [including assumpsit] shall be commenced within six years next after the cause of such action accrued, and not after.’ (2 R. S. 295, § 18.) If the plaintiff sues on the note, ‘the cause of action accrued’ more than sixteen years before the suit was commenced, and of course the action is barred. There is but one possible mode of escaping this difficulty; and that is by saying, that the plaintiff does not sue upon the note, but upon the new promise; treating it as a new contract, springing out of, and supported by, the original consideration. That will do very well where the original promise was made by one; or if by more than one, where all join in making the new contract. But in this case, the new contract was made by only one of the three original debtors; and the question is, what binds the other two? As they did not contract for themselves, it is not their agreement, unless John Van Keuren, who made the new promise, had authority to contract for them. The only authority claimed for him is, that he had before been the partner of the other two. This leads to an inquiry concerning the principle on which each partner can bind all his associates. And it is generally agreed, that it is the principle of agency. Each partner, when acting within the scope of the partnership, is deemed to be the authorized agent of all his fellows. The authority is presumed from the nature and necessity of the case; for, without it, third persons would not be safe in dealing with one of the associates, and the business of the partnership could not be carried on with success. Now, how long does this presumed agency continue? Clearly, no longer than the necessity for it exists; and, for most purposes, the necessity ceases with the termination of the partnership. When that is dissolved there is no longer any ground for presuming an agency, except as to such things as are indispensable in winding up the concerns of the company. If there be no agreement to the contrary, it may be presumed that each partner still has authority to dispose of the partnership property, to collect, adjust, and pay debts, and give proper acquittances. But there is no ground whatever for presuming a power to make new promises or engagements in the name of the firm, even though they only change, without increasing the prior obligations of the partners. We shall presently see, upon authority, that they have no such power.

"In reference to the statute of limitations, a distinction has sometimes been taken between a new promise made before the statute has run, and one made after the parties have been exonerated by the lapse of time. That would sustain the defence in this case; for the statute had run upon the claim long before the new promise was made. But the defence may be rested upon the still broader ground, that the dissolution of the partnership was a revocation of the agency, and the power of the partners to bind each other by new engagements ceased from that moment.

"The statute of 21 James I. c. 16, which limited actions on promises to six years, was not very well received by the legal profession; and although the early decisions under it are not open to much observation, it was not long before the courts began to regard the statute with disfavor, and to resort to the most subtle constructions for the purpose of restricting its influence. There was a period when one who was spoken to on the subject of an old debt, could not well give a civil answer, without saying enough to take the case out of the statute. At a later period, and since the commencement of the present century, the courts began to regard this as a beneficial statute, — a statute of repose, — and commenced the difficult task of retracing their steps. But there were many obstacles in the way of the backward movement; and the legislature, both here and in England, took up the matter, and went beyond the old statute, by requiring the new promise or acknowledgment to be in writing. In consequence of the early departure from principle in the construction of the statute, the different views which prevailed at different periods, and the unequal pace of the courts in attempting to get back on to solid ground, the books are full of conflicting decisions; and any attempt to reconcile them would be a useless waste of time. I shall not, therefore, go into a general review of the cases.

"The leading case on this question in England is *Whitcomb v. Whiting* (Doug. 652), where Lord Mansfield and his associates held, that part payment, within six years, by one of four joint and several makers of a promissory note, took the case out of the statute of limitations as to all of the makers. That case is distinguishable from the one before us in two particulars. First, it does not appear in that case that the action was barred prior to the payment; while here, the statute bar was complete long before the new promise was made. Second, that was the case of a payment, which has been deemed much safer ground to go upon than a new promise or acknowledgment. Lord Tenterden's Act (9 Geo. IV. c. 14), which requires a writing in the case of a new promise or acknowledgment, leaves the effect of a payment untouched; and such, in substance, is the provision in our recent code. (Stat. 1849, p. 688, § 110.) In *Wyatt v. Hodson*, 8 Bing. 809, Tindal, C. J., said: 'The payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment.' There is force in these remarks.

"But I do not intend to lay much stress upon the distinctions between that case and the one at bar. Lord Mansfield made no distinction between the influence of a payment and a promise; and, if his reasoning is sound, it reaches this case. His words are: 'Payment by one is payment for all, the one acting, virtually, as agent for the rest; and, and in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due.' Nothing but the great name of Lord Mansfield could have given currency to this reasoning. It is plain enough that 'payment by one is payment for all,' so far as relates to the satisfaction of the debt; but that fact neither shows, nor has it any tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due; and, like any other admission, it

can only affect the party who makes it, unless he has authority to speak for others as well as himself. A joint debtor has no such authority. It cannot be justly inferred from the relation which he sustains to the other joint debtors; and though he may conclude himself by an admission, he cannot conclude them. His lordship, after saying, that 'payment by one is payment for all,' adds: 'the one acting virtually, as agent for the rest.' If the meaning be, that there is such an agency as will make the payment by one inure to the benefit of all the joint debtors, the reasoning is well enough; but it proves nothing on the point in controversy. If the meaning be, that one joint debtor is the agent of the others for the purpose of making admissions to bind them, that was assuming the very point to be proved; and the assumption had neither authority nor argument to support it. There is nothing in the relation of joint debtors from which such an agency can be inferred. A joint obligation is the only tie which links them together; and from the nature of the case, payment of the debt is the only thing which one has authority to do for all. I am persuaded that such a decision would not have been made, had it not been for the strong disposition which prevailed at that time to get round the statute of limitations. It was in direct conflict with *Bland v. Haselrig*, 2 Ventris, 151, which was decided ninety years before, when the statute was in better repute; and which is an authority in point, against the judgment under review. The case was this: in assumpsit against four, the statute of limitations was pleaded, and the verdict was, that one of the defendants promised within six years, but the others did not. Upon this verdict, judgment was rendered for the defendants. The case of *Whitcomb v. Whiting* has been several times questioned in England, and in *Atkins v. Tredgold*, 2 B. & C. 23, the court seemed much disposed to disregard it. But the authority of a great name has proved more than a match for common sense; and the decision in *Douglass* is now regarded as good law in England. *Pecham v. Raynal*, 2 Bing. 306; *Pritchard v. Draper*, 1 Russ. & Myl. 191. But it is not so in this country. Although the case in *Douglass* has been followed in some of the States, it has been questioned in others; and in several of the States, and by the Supreme Court of the United States, it has been wholly disregarded. I shall hereafter have occasion to refer to some of the cases.

"I will now inquire how the question stands in this State. It first came up in *Smith v. Ludlow*, 6 Johns. 267, nearly forty years ago, when the statute of limitations was in bad repute, and when few men ventured to think for themselves after Lord Mansfield had spoken. The court said, that, where the original debt was proved, the confession of one partner, though made after the dissolution of the partnership, would bind the other, so as to prevent him from availing himself of the statute of limitations. This was said on the authority of *Whitcomb v. Whiting*, already mentioned, and *Jackson v. Fairbank*, 2 H. Black. 340, which was decided on the authority of the same case, though it went a more extravagant length. Of the case in *Douglass* I have already spoken; and of the case in *Blackstone* it is enough to say, that it has been condemned in England, *Brandram v. Wharton*, 1 B. & Ald. 463, and overruled in this State. *Rosevelt v. Mark*, 6 Johns. Ch. 266, 291. I may add, that what was said in *Smith v. Ludlow*, about binding one partner by the confessions of the other, made after the partnership had been dissolved, was not necessary to the decision of the cause; for there had been confessions by both of the partners, which the court held sufficient to take the case out of the statute, without making the admission of one evidence against the other. Still, on the authority of this case, and those in *Douglass* and *Blackstone*, it was decided in *Johnson v. Beardslee*, 15 Johns. 8, that the promise of one joint debtor was sufficient to take the case out of the statute. And in *Patterson v. Choate*, 7 Wend. 441, it was held, that, although one partner cannot, after a dissolution, bind the other by a new contract, yet his acknowledgment of a previous debt due from the partnership will bind the other partner, so far as to

prevent him from availing himself of the statute of limitations. This doctrine has been mentioned on other occasions; *Hopkins v. Banks*, 7 Cow. 658; *Rosevelt v. Mark*, 6 Johns. Ch. 291; *Dean v. Hewit*, 5 Wend. 262; but there are, I believe, no other decisions in this State to the like effect. In *Patterson v. Choate*, the six years had run, and the bar was complete before the acknowledgment was made. No one, I venture to say, who does not go upon the ground that the statute of limitations ought not to be enforced, can assign a solid reason for the distinction between contracting a new debt against a former partner, and making an acknowledgment which shall charge him with that which, though once a debt, had ceased to be so by the operation of law. I agree with the late Chief Justice Spencer, in *Sands v. Gelston*, 15 Johns. 519, that, 'the statute of limitations is the law of the land;' and that in point of principle, 'there is no substantial difference between a debt barred by the statute of limitations, and a debt for the payment of which the debtor has been exonerated by a discharge under a bankrupt or insolvent act.' Still, if there was no counterbalance in the adjudications of our own courts, I should feel bound to follow the two or three cases which support the plaintiff's claim, and leave reforms to the legislature. But those cases conflict in principle with many other decisions in this State, and cannot be supported.

"Although the rule is different in England in relation to admissions concerning partnership transactions (*Wood v. Braddick*, 1 Taunt. 104), it has been settled by a series of adjudications in this State, that the authority of partners to bind each other by any undertaking, or admission, even though it relate to partnership transactions, ceases with the partnership. In *Hackley v. Patrick*, 8 Johns. 536, although it was mentioned in the notice of dissolution, that *Hastie*, one of the partners, would adjust the unsettled business of the partnership, it was held that his subsequent admission of a balance due from the firm to the plaintiffs on account would not bind his copartner. The court said, it was 'a clear case. After a dissolution of a copartnership, the power of one party to bind the others wholly ceases. There is no reason why his acknowledgment of an account should bind his copartners, any more than his giving a promissory note in the name of the firm, or any other act.' This doctrine was reasserted and applied in *Sanford v. Mickles*, 4 Johns. 224, where it was held, that a partner, to whom authority had been given on the dissolution to collect and pay debts, could not indorse a promissory note belonging to the firm so as to pass the title to the indorsee. See *Yale v. Eames*, 1 Met. 486. In *Walden v. Sherburne*, 15 Johns. 409, it was again decided that the admission by one of the partners, after a dissolution, of a balance against the firm, did not bind the other partner. And where the notice of dissolution stated that the business would be settled by one of the partners, who was duly authorized to sign the name of the firm for that purpose, it was held, that such partner could not renew a note previously given by the firm, and which was running in the bank at the time of the dissolution. *National Bank v. Norton*, 1 Hill, 572. *Mitchell v. Ostrom*, 2 Hill, 520, asserts the same general doctrine. And in *Baker v. Stackpole*, 9 Cowen, 420, the rule that one partner, after a dissolution, cannot bind his fellows by an admission relating to partnership transactions, was sanctioned by the unanimous judgment of the court for the correction of errors.

"Enough has, I think, been said to justify the remark, that the two or three cases on which the plaintiff relies cannot be supported. They conflict in principle with a series of decisions spreading over a period of forty years, and including a determination of the court of last resort.

"But this is not all. Since the Supreme Court first fell into the error of following *Whitcomb v. Whiting*, the course of decision upon the statute of limitations has undergone a great change in this country, and particularly in this State. At the former period, the statute amounted to little more, in judicial construction, than a ground



for presuming the debt paid, which might be rebutted by the mere admission that such was not the fact. But the law is not so now. There must be a promise, a new contract, though founded on the original consideration, to take a case out of the statute. If the promise is not express, the case must be such that it can be fairly implied. There must, at the least, be a plain admission that the debt is due, and that the party is willing to pay it. *Allen v. Webster*, 15 Wend. 284; *Stafford v. Richardson*, Ib. 802; *Bell v. Morrison*, 1 Peters, 862. It is the new promise and not the mere acknowledgment, that revives the debt and takes it out of the statute. *Rosevelt v. Mark*, 6 Johns. Ch. 290. This doctrine is sustained by many decisions in other States; but I do not think it necessary to cite them.

"The case of *Whitcomb v. Whiting* has, to a limited extent, been followed in Massachusetts: *Cady v. Shepherd*, 11 Pick. 400; *Bridge v. Gray*, 14 Ib. 55; *Sigourney v. Drury*, Ib. 887, 891, 892; *Vinal v. Burrill*, 16 Ib. 401. In Connecticut: *Bond v. Lathrop*, 4 Conn. 886; *Coit v. Tracy*, 8 Ib. 268; *Austin v. Bostwick*, 9 Ib. 496; *Clark v. Sigourney*, 17 Ib. 511. In Maine: *Parker v. Merrill*, 6 Greenl. 41; *Pike v. Warren*, 15 Me. 890; *Dinsmore v. Dinsmore*, 21 Ib. 483; *Shepley v. Waterhouse*, 22 Ib. 497. And in Vermont: *Joslyn v. Smith*, 18 Vt. 858; *Wheelock v. Doolittle*, 18 Ib. 440. But I think the judgment under review would not be upheld in either of those States. In North Carolina it has been held, that the acknowledgment of the debt by one partner, though after the dissolution, will prevent the operation of the statute. *McIntire v. Oliver*, 2 Hawks, 209. And the same has been decided in Georgia, provided the new promise is made before the action is barred; but not when the new promise is made afterwards, as it was in the case before us. *Brewster v. Hardeman*, Dudley, 188. It has been decided by the Court of Appeals, in South Carolina, that a promise by one partner made after the dissolution, and after the statute had run, will not charge the other partner. *Steele v. Jennings*, 1 McMullen, 297. In the *Exeter Bank v. Sullivan*, 6 N. H. 124, the authority of *Whitcomb v. Whiting* was wholly denied; and the court held, that a payment by one of the joint makers of a promissory note did not take the case out of the statute as to the other. (a) In Alabama, a promise by the principal debtor will not revive the demand against a co-debtor, who is a surety. *Lowther v. Chappel*, 8 Ala. 858. In Tennessee, a promise by one partner after the dissolution of the partnership, to pay a note made by the firm, does not take the case out of the statute of limitations as to the other partner. *Belote's Ex'rs v. Wynne*, 7 Yerger, 584; *Muse v. Donelson*, 2 Humph. 166. This is also the rule in Pennsylvania. *Levy v. Cadet*, 17 S. & R. 126; *Searight v. Craighead*, 1 Pen. & Watts, 185. It is also held in Indiana, that the power of one partner to bind the other by the admission of a debt ceases with the partnership. *Yandes v. Lefavour*, 2 Blackf. 371. And in *Bell v. Morrison*, 1 Peters, 851, the Supreme Court of the United States followed the decisions in Kentucky, and held that the dissolution of the partnership put an end to the authority of the partners to bind each other by any new engagement; and consequently that the acknowledgment of a debt by one partner, after the dissolution, would not take the case out of the statute of limitations. The elaborate argument of Mr. Justice Story, who delivered the opinion of the court, covers the whole field of discussion, and stands on principles, which, though they may be disregarded, cannot be overthrown.

"I have not stopped to inquire whether the statute operates upon the debt or the remedy; for, though this might be a point to be considered in a court of conscience, it is of no practical importance in a court of law. We are not dealing with moral but with legal obligations; and it is idle to talk of a debt where there is no legal obligation to pay it.

(a) [So in Arkansas, *Mason v. Howell*, 14 Ark. 199.]

"I am of opinion that the judgment should be reversed, and that judgment should be rendered for the defendants on the verdict.

"Jewett, C. J., also delivered a written opinion in favor of reversal.

"And thereupon the judgment of the Supreme Court was reversed, and judgment awarded for the defendants on the special verdict." And see also *Burger v. Durvin*, 22 Barb. (N. Y.) 68; *Watts v. Devor*, 1 Grant (Penn.), 267.

And in a more recent case, the Supreme Court of the same State has gone still further than the court went in *Van Keuren v. Parmelee*, and held, that part payment by one of several joint makers *before* the statute has barred an action on the note, will not take the case out of the statute as to the other makers. *Dunham v. Dodge*, 10 Barb. (N. Y.) Sup. Ct. 566; *Shoemaker v. Benedict*, 1 Kernan (N. Y.), 176. And see also *Coleman v. Fobes*, 22 Penn. 808. The same is true if the payment be *after* the statute has barred the action. *Payne v. Slete*, 89 Barb. (N. Y.) 634; *Bush v. Stowell*, 71 Pa. St. 208; *Borden v. Pray*, 20 Ark. 298. Though it is held by the latter court that, if the payment be made by one partner before the debt is barred, it will take the debt out of the statute as to another. *Burr v. Williams*, 20 Ark. 174; *Hicks v. Lusk*, 19 Ark. 692. For other cases, in addition to those cited in the opinion above quoted, showing a tendency to break away from the authority of *Whitcomb v. Whiting*, see *Whipple v. Stevens*, 2 Foster (N. H.), 219; *Way v. Bassett*, 5 Hare, Ch. 55; *Biscoe v. Jenkins*, 5 Eng. (Ark.) 108; *Biscoe v. James*, *Ib.* 163; *Bogert v. Vermilya*, 10 Barb. (N. Y.) Sup. Ct. 82; *Ellicott v. Nichols*, 7 Gill (Md.), 85; *Bibb v. Peyton*, 11 S. & M. (Miss.) 275; *Lane v. Doty*, 4 Barb. (N. Y.) Sup. Ct. 530; *Disborough v. Jones*, 1 N. J. 677; *Disborough v. Biddleman*, 1 Spencer (N. J.), 275; *Balcom v. Richards*, 6 Cush. (Mass.) 360; *Cox v. Bailey*, 9 Ga. 467; *Zent v. Hart*, 8 Barr (Penn.), 337; *Grant v. Ashley*, 7 Eng. (Ark.) 762; *Woody v. State Bank*, *Ib.* 780; *Pitt v. Wooten*, 24 Ala. 474. As to effect of part payment by one of several joint contractors, see also *post*, § 275; *Day v. Baldwin*, 34 Iowa, 380.]



## CHAPTER XXIV.

## ACKNOWLEDGMENTS BY AND TO AGENTS, EXECUTORS, ETC.

261. AN acknowledgment made by an agent in respect to demands relating to concerns within the scope of his authority is binding upon the principal. It is upon this principle, that one co-contractor may bind another by part payment. And though a partner may not bind the firm after dissolution, by a part payment, or a new promise, he may do so if appointed to settle the affairs of the concern.<sup>1</sup> A partnership dissolved for future operations, and remaining in force for closing the business of the concern; and the liquidating partner retaining his former power to bind the firm in things within the scope of the business committed to him; a payment by him on account of a simple contract debt of the firm in such case is such an acknowledgment as will take the claim out of the operation of the statute.<sup>2</sup> Where an agent had been employed to pay money for work done, and the workmen were referred to him for payment, and he assents to it, it was held by Lord Ellenborough, that an acknowledgment, or promise to pay by him, will, after six years, take the case out of the statute.<sup>3</sup> So where the plaintiff relied on a new promise, as an answer to the statute, which was made by the defendant's *wife*, who managed the business, and generally gave orders and paid for goods; Buller, J., held, that her promise was binding on the defendant, and took the case out of the statute; and ruled, that the promise of any servant, or agent, intrusted by the defendant to transact his business for him, would have the same effect.<sup>4</sup> So, also, in an action against a husband for goods supplied to his wife, for her ac-

<sup>1</sup> *Smith v. Ludlow*, 6 Johns. (N. Y.) 267; *Bell v. Morrison*, 1 Peters (U. S.), 351; *Haven v. Hathaway*, 2 App. (Me.) 347.

<sup>2</sup> *Housen v. Irving*, 3 Serg. & Watts (Penn.), 345.

<sup>3</sup> *Burt v. Palmer*, 5 Esp. 145. [*Forster v. Thompson*, 2 Con. & Law. 568. A promise by an individual member of a college corporation will not take the case out of the statute. *Lyman v. Norwich Univ.*, 28 Vt. (2 Wins.) 645.]

<sup>4</sup> *Palethorp v. Furnish*, 1 Esp. 511, note. [*Burk v. Howard*, 13 Mo. 241; *Barger v. Durvin*, 22 Barb. (N. Y.) 68; *First Nat. Bk. of Utica v. Ballou*, 49 N. Y. 155.]

commodation, while he occasionally visited her, Lord Ellenborough thought, that her letters were admissible evidence of an acknowledgment of the debt, to take the case out of the statute; and that she was to be considered, in such a case, as her husband's agent.<sup>1</sup> On the same principle, a party is bound by the declarations and admissions of his *counsel*. Mr. J. Burrough said, he saw no difficulty at all in the question, whether parties are bound by the acts and declarations of their counsel. And if the plaintiff, he said, is in court, and hears what his counsel says, and makes no objection, he is bound.<sup>2</sup>

262. The relation of husband and wife, and the bearing it has upon the acknowledgments and new promises, may be here appropriately introduced. Where an action was brought against one F. and J. N., and M. the wife of J. N., upon the joint note of F. & M. made before the marriage of M., laying the promise to pay it by F. & M. *dum sola*, and the defendants pleaded the statute, whereupon issue was joined; it was held, that the acknowledgment of the note by F., after six years, and after the marriage, will not be evidence to support the issue. As an acknowledgment operates, if at all, as a new substantive promise, and there could have been no promise by the wife, she not being competent to make one; and the promise being laid by F., together with M., *dum sola*, could not be satisfied by evidence of a promise by F. & J. N., made after the intermarriage of the latter with M. There was another fatal ob-

<sup>1</sup> Gregory v. Parker, 1 Camp. 394; and *vide* also Anderson v. Sanderson, 2 Stark. 204; s. c. Holt's N. P. C. 591.

<sup>2</sup> Colledge v. Horn, 8 Bing. 119. [It most clearly appears that the agent has authority to act in the premises; and this does not sufficiently appear from the fact that he contracted the original debt. Watts v. Devor, 1 Grant (Penn.), 267. A purchased land of B, and indorsed notes to him, out of which to realize the purchase-money, and C, at the request of A, afterwards applied to B for a deed of the land. B refused the deed on the ground that the notes were not paid. C thereupon stated that A would pay the notes if the makers did not, and B then gave his deed to A, who accepted it. Held, that the promise by C, although not authorized by A, was sufficient to take the case out of the statute of limitations, as A received and retained the benefit of the promise. Bowers v. Johnson, 10 S. & M. (Miss.) 169. A owed B \$284, of which \$84 was contracted for the benefit of C, and which C agreed to pay. After the statute had run against the whole account, C gave his note to B for the sum of \$84. Held, that the debt was not revived against A. Carlisle v. Morris, 8 Ind. 421. And see also Harding v. Edgecumb, 4 Hurl. & Nor. 872. Payment by a debtor, summoned into court as the trustee of his creditor on a judgment obtained against the trustee upon default, will not remove the bar of the statute. Goodwin v. Buzzell, 35 Vt. (6 Shaw) 9.]

jection presented by the facts of the case. The wife had been married above six years, so that there could not have been a promise from her *dum sola*, within six years, which fact alone, said Holroyd, J., would have decided the question.<sup>1</sup> A promise by husband and wife, during coverture, to pay the debt of the wife contracted *dum sola*, and which has been barred by the statute, will not revive the debt so as to give a right of action against the wife, after the death of her husband.<sup>2</sup> A promise by the husband, that he will see a debt paid which the wife contracted when *sole*, which has been barred by the statute, will not remove the bar in a suit against husband and wife.<sup>3</sup>

263. It was held by Chancellor Kent, that any acknowledgment or admission by an *executor* or *administrator* will not bind the real assets in the hands of an heir or devise. Is the heir, he inquires, "to be charged, at the mere pleasure of the executor, with the debts of the ancestor? Does it rest entirely in the discretion of the executor, whether the heir is or is not to be permitted to use the statute of limitations, which the law has provided as a means of defence against a simple contract demand, which perhaps he knows to be unjust, though his ancestor has not left him the requisite proof?" He could not, he thought, bring his mind to think so.<sup>4</sup> Then how far are the same interrogatories applicable to an executor or administrator as possessor of the personal estate of the testator or intestate, simply as *trustee* for the creditors and legatees?<sup>5</sup> The reasoning of Mr. Justice Story, in *Bell v. Morri-*

<sup>1</sup> *Pitman v. Foster*, 1 Barn. & Cress. 248.

<sup>2</sup> *Kline v. Guthart*, 2 Penn. 490.

<sup>3</sup> *Powers v. Southgate et ux.*, 15 Vt. 471. [If a *feme covert*, after her intermarriage, make part payment of a debt contracted before marriage, it will not take the debt out of the statute of limitations, if the debt is barred before the part payment. And no promise of the husband, which can affect the right of the wife, can be implied by a part payment of a debt contracted by her *dum sola*. *Farrar v. Bessy et ux.*, 24 Vt. (1 Deane) 89. So, although the payment be made before the note is barred, it being made without the husband's privity. *Neve et al. v. Hollands et ux.*, 12 Eng. Law & Eq. 398. But a promise made by the wife, in the presence of the husband, and tacitly assented to by him, will revive the debt. *Orcutt v. Berrett*, 12 La. An. 178. A *feme sole*, payee of a promissory note, married, and her husband survived her. The husband did not reduce the *chose in action* to possession, though he received the interest during her life. Held, in an action by her administrators, that the payment of interest was to her agent, and was an answer to the plea of the statute. *Hart v. Stephens*, 6 Q. B. 937.]

<sup>4</sup> *Mooers v. White*, 6 Johns. (N. Y.) Ch. 373, 374.

<sup>5</sup> See, *ante*, Ch. XVI. § 8, p. 163.

son,<sup>1</sup> is some answer. The proper resolution of the point, the court in that case thought, whether or not an acknowledgment or promise by one partner after dissolution will revive a partnership debt against all the partners is to be deemed a *new contract*, “springing out and supported by the original consideration.” The court declared it was so, both upon principle and authority. Then the question as to executors and administrators resolves itself into this, — have they authority, acting as trustees of the personal property, to make a new contract binding upon those in whose behalf they are appointed to administer it? The subject seems thus to present itself.

264. Many cases have made a distinction, and hold that an executor or administrator may only by an *express* promise take a case out of the statute. “As against an executor,” says Chief Justice Abbott, “an acknowledgment merely is not sufficient to take a case out of the statute; there must be an express promise.”<sup>2</sup> The Supreme Court of Maine thought that “declarations or acknowledgments, from which a new promise might be inferred, if made by the debtor himself, when made by an executor or administrator, will not be sufficient to charge the estate;” and that “there must be a clear agreement or promise to pay.”<sup>3</sup> In a case in New York, there was an express promise by the executor to pay, and it was held to be sufficient.<sup>4</sup> The only question in Deyo’s

<sup>1</sup> Bell v. Morrison, 1 Peters (U. S.), 851.

<sup>2</sup> Tullock v. Dunn, Ryan & Mood. 416. And see Atkins v. Tredgold, 2 Barn. & Cress. 12; M’Culloch v. Dawes, 9 Dow. & Ry. 40. The same distinction is recognized in Virginia. Lewis v. Bacon, 8 Hen. & Munf. 105; Henderson v. Foote, Call, 248; Epes v. Dudley, 8 Rand. 487. And in Kentucky. Hea v. Manners, 8 J. J. Marsh. 255. *Semble*, a notice in a newspaper by a personal representative that he will pay all debts justly due from his testator will *prevent* a debt being barred by the statute. But *semble*, a debt is not taken out of the statute by an advertisement published by the administrator, requesting all persons having claims on the estate to send in statements of their demand, prior to their being laid before A. B., by whom the persons claiming to be creditors are to submit to be examined touching the same, if he shall see occasion, in order to their being approved and paid, or rejected, if such latter course be deemed expedient. Jones v. Scott, 1 Russ. & Mylne, Ch. 255; and 4 Eng. Con. Ch. 418.

<sup>3</sup> Oakes v. Mitchell, 8 Shep. (Me.) 360. In this case the words “an arrangement will soon be made to pay the note. I calculate to pay it, and I always calculated to pay it,” addressed by the administrator of an estate to the holder of a note barred by the statute, were held not sufficient to charge the estate.

<sup>4</sup> Johnson v. Beardsley, 15 Johns. (N. Y.) 8. [And in New Jersey. Shreve v. Joyce, 86 N. J. 44.]

*Ex'rs v. Jones's Ex'rs*<sup>1</sup> was, whether the admission of an executrix was sufficient to take the note in question of the testator out of the statute. The executrix, as legatee, had consented, in accounting before a surrogate, that a note barred by the statute given by the testator, her husband, might be charged against her share of a residuary fund. It was held that this consent could not be converted into an acknowledgment of indebtedness and willingness to pay, in an action against her, as the executrix of her husband.

265. In *Thompson v. Peters*, in the Supreme Court of the United States,<sup>2</sup> what was said by the administrator, which it was contended amounted to a sufficient acknowledgment, the court held, would not have been even against the original debtor. "But," says Chief Justice Marshall, who gave the opinion of the court, "this is not a suit against the original debtor; it is brought against his representative, who may have no personal knowledge of the transaction. Declarations against him have never been held to take the promise of a testator or intestate out of the act. Indeed the contrary has been held." In Connecticut, the executor has the same control over the real as he has over the personal estate; and it has been held by the Supreme Court of that State (on an issue formed in the action of debt by book), on the point whether if the plaintiff's cause of action accrued within six years, an acknowledgment of the debt by an executor will support the issue on the part of the plaintiff, that it would not.<sup>3</sup> In Massachusetts, it was held, that an administrator cannot revive a debt due to himself from the intestate, which, at the intestate's decease, was barred by the statute;<sup>4</sup>

<sup>1</sup> *Deyo's Ex'rs v. Jones's Ex'rs*, 20 Wend. (N. Y.) 491.

<sup>2</sup> *Thompson v. Peters, &c., Adm'rs*, 12 Wheat. (U. S.) 565.

<sup>3</sup> *Peck v. Botsford*, 7 Conn. 176.

<sup>4</sup> *Richmond (Petitioner)*, 2 Pick. (Mass.) 567. Prior decisions in Massachusetts, in relation to the subject generally, are thus commented on and explained, by Daggett, J., who gave the opinion of the court in *Peck v. Botsford*, *supra*: "*Baxter v. Penniman*, 8 Mass. 134, shows only that an admission made to an executor or administrator is sufficient to take a case out of the statute of limitations. The debtor himself may certainly waive the statute. In the opinion given, however, the court speak to the following effect: 'An admission by or to an executor or administrator, after six years, will,' &c. So far as that opinion regards an acknowledgment by an executor or administrator, the case did not call for it; and therefore it is entirely *obiter*. In *Emerson v. Thompson*, 16 Mass. 429, the same doctrine is recognized, on a case where a new promise was by an executor, and the only case cited is that in 8 Mass. 134, which, as has been shown, did not affect the point in controversy." . . . "The only cases, cited by the counsel for the plaintiff, not already considered, are those in *H Black*. 102, 2 Saund. 117, *e*, note 2. They prove only that a count on an account

it is so held, likewise, in New York,<sup>1</sup> and in Kentucky.<sup>2</sup> Notwithstanding the comments upon the early cases, in Massachusetts, in the note to the case of Richmond, *supra*, it was held, in *Manson v. Felton*, in Massachusetts,<sup>3</sup> that a promise within six years by the guardian of a spendthrift, to pay a debt due from the ward, will take the debt out of the statute; the court being clearly of opinion that it was within the principle of an acknowledgment by an executor, which, they said, in that commonwealth, had repeatedly been held sufficient to avoid the operation of the statute; it was an admission of the validity and non-payment of the note in question; by the only person in existence charged with the liquidation and payment of it.<sup>4</sup>

266. By the Supreme Court of Pennsylvania, in the year 1836, it was expressly held, that an executor or administrator, sued in his representative character for a debt due to the decedent, may plead the statute as a bar to the action, although such executor or administrator may have made such a declaration as, in the case of *a person sued for his own debt*, would be sufficient, as a new prom-

stated with an executor for money due from the testator may be joined with a count on a promise, made by the testator; and that this is the usual mode of declaring against executors to save the statute of limitations. It is not easy to see how these cases prove the point for which they are introduced." He relied also on *Mooers v. White*, *supra*. But, *contra*, 4 Har. & Johns. (Md.) 527.

<sup>1</sup> *Rogers v. Rogers*, 3 Wend. (N. Y.) 502.

<sup>2</sup> *Hord v. Lee*, 4 Monroe (Ky.), 87.

<sup>3</sup> *Manson v. Felton*, 13 Pick. (Mass.) 206. [So part payment by an administrator, though there be no promise to pay the balance, takes the balance out of the statute. *Foster v. Starkey*, 12 Cush. (Mass.) 324. The fact that the payment is by one of two joint administrators, without the knowledge of the other, makes no difference. The administration, in contemplation of the law, is a unit. *McLaren v. McMartin*, 36 N. Y. 88; *Heath v. Grenell*, 61 Barb. (N. Y.) 190. But payment of a dividend by the assignee of an insolvent debtor will not take the residue of the debt out of the statute as against the debtor. *Richardson v. Thomas*, 13 Gray (Mass.), 381. But an administrator is bound to plead the statute to a cause of action already barred, and a new promise will not revive such cause. *Seig v. Acord*, 21 Gratt. (Va.) 365; *Huntington v. Babbitt*, 46 Miss. 528.]

<sup>4</sup> [And in Kentucky it has also been held that a promise by an executor takes the case out of the statute. *Northcut v. Wilkins*, 12 B. Mon. (Ky.) 408. So in Alabama. *Hall v. Darrington*, 9 Ala. 502. And see *Taft v. Stephenson*, 9 Eng. Law & Eq. 80; *Briggs v. Wilson*, 39 Ib. 62; *Quynn v. Carroll*, 10 Md. 197; *Tazewell v. Whittier*, 13 Gratt. (Va.) 329; *Griffin v. The Justices, &c.*, 17 Ga. 96; *Walker v. Cruikshank*, 28 La. An. 252. Part payment by an administrator will take a debt out of the statute as against an administrator *de bonis non*; and if the administrator, being a creditor, retains certain sums in part payment, the same rule applies. *Semmes v. Magruder*, 10 Md. 242.]



ise, to take the case out of the statute.<sup>1</sup> As the opinion of the court, in this case, is very illustrative, and has particular relation to the principle governing the modern decisions upon the subject of acknowledgments and new promises, and, moreover, as it impairs the authoritative force of prior cases in Pennsylvania, which have been relied on as authority conflicting with the sense of the court, it will not be deemed too great a liberty here to give it place. By Gibson, Ch. J.:—

“The concession that the plaintiff’s claim is just, and the promise to see what could be done for him, would doubtless be sufficient to maintain an action, if the consideration were the defendant’s own debt. But *can* any acknowledgment by an executor or administrator preclude him from pleading the statute of limitations to a count on the original cause of action? In *Jones v. Moore*, 5 Bin. 573, and subsequently in *Bailey v. Bailey*, 14 Serg. & Rawle, 195, and *Scull v. Wallace*, 15 Serg. & Rawle, 231, it was doubtless taken for granted, that a recovery may be had against a plea of the statute, on proof of an acknowledgment by the personal representative. But it is to be remarked, that the point has not been adjudged, and that no recovery has in fact been had; and the inquiry is consequently not clogged by the authority of a precedent. In respect to the first of those cases, it is fair, too, to say it was the first step taken by this or perhaps any other court, in returning to the spirit and letter of the statute. But when it was determined that a recognition of the old debt is no more than evidence of a new promise, which, when made *to* the representative of a decedent, can be sued by him but in a personal character, it was virtually determined that the same recognition *by* a personal representative is but evidence of a new promise, on which he may not be sued, otherwise than in his personal character, without overturning some of the most firmly fixed principles of the law; for nothing is better settled than that an executor or administrator is answerable, in his official character, for no cause of action that was not created by the act of the decedent himself; and it is, therefore, singular, that the principle, in its application to these convergent propositions, was not carried out. In actions against the personal representative, on his own contracts and engagements, though made for the benefit of the estate, the judgment is *de bonis propriis*; and he is, by every principle of legal analogy, to answer

<sup>1</sup> *Fritz v. Thomas*, 1 Whart. (Penn.) 66. [Clark v. McGuire, 85 Penn. St. 259.]



it with his person and property. The pleadings, it is true, have not hitherto been moulded to the new principle; nor could they be in the case of an acknowledgment by a personal representative, whose promise gives no action against him, unless it be sustained by some other consideration than the previous debt, which imposes no moral obligation to pay it out of his own pocket, especially since he has been deprived of all color of title to the residue. Had the judges, when they determined that a promise to the representative of a decedent must be declared on as such, also determined that it must be declared on as such, when made by him, they would have restored the law to its primitive symmetry, and suggested a principle that would have entirely extinguished the notion of revival, which, for want of it, seems to have lingered in its embers through the succeeding cases; for the forms of the law are the indices and conservatories of its principles. It would not only have indicated the necessity of a special consideration, to support the promise of a representative, but it would have disclosed a bar to an action against two or more, on a promise by one. And as he cannot charge himself personally without a new consideration, he cannot charge the estate, on the foundation of the old one, to the prejudice of the creditors, whose fund might be materially lessened by it. He is not bound to plead the statute, because he may know the debt to be a just one; and for that reason only, the matter is left to his discretion; but it follows not, that he may tie up his hands from using it, when the time has come, by a mistaken concession, or an engagement which has no consideration to bind him personally or officially. Besides, it would be hazardous to expose the estate to the consequences of his inexperience or ignorance of the demands made upon him. We know how perilous a thing it is for the debtor himself, though armed with knowledge and vigilant to guard against surprise, to converse about a debt barred by the statute; but the peril would be overwhelming, if the estate were to be jeopardized by the mistakes of one who is bound to parley, and has not only every thing to learn, but to learn it from those whose interest it is to mislead him. Why, then, should we not finish what was so well begun in *Jones v. Moore*, by making the law of the subject consistent in all its parts, and giving to the statute entire effect, both in substance and in form? To do so, would involve no violation of that case as a precedent, for, as I have said, the point was not adjudged; and the step remaining to be

taken in the progress of departure from the doctrine of revival is no greater than was taken there. Indeed, there is no course open to us but to follow the principle out, or abandon it altogether; for, to be consistent, we must either return to the doctrine of revival without qualification, or maintain that an action on his own promise lies not against an executor or administrator in his official character. And for saying it does not, we have the authority of *Thompson v. Peters*, 12 Wheat. 565, and *Peck v. Botsford*, 7 Con. 178; in both of which, the point was directly ruled.”<sup>1</sup>

267. In a subsequent case in Pennsylvania, wherein it was held, that an executor's promise to pay a debt of the testator will not take it out of the statute, the court rely upon the above case in support of the ground, that, as the old promise was not revived, but superseded by the new one, the consideration of a moral obligation would be wanting to make the executor personally liable.<sup>2</sup> An admission by one co-executor of a debt due from his testator is nowhere receivable as evidence in a suit for the debt, against another co-executor, to establish the origin of the demand, as to make the other personally liable; though otherwise to take it out of the statute, if the original demand against the testator is *aliunde* established.<sup>3</sup>

268. As the debtor may waive the statute by a sufficient acknowledgment, or by one which amounts to a new promise either express or implied, he may make it to the executor or administrator upon the estate of his deceased creditor and will be bound by it. Thus in *Martin v. Williams*, executor of Williams, in error, it was held, in New York,<sup>4</sup> that in an action by an executor, an acknowledgment of the debt to him within six years, by the debtor, is evidence to support a new promise; and in *Dexter v. Penniman*, in Massachusetts,<sup>5</sup> the court say that an admission to an executor

<sup>1</sup> [An express promise by an administrator will not revive the debt against the estate of his intestate. *Sanders v. Robertson*, 28 Miss. (1 Cush.) 389; *Moore v. Hardison*, 10 Texas, 467; *Moore v. Hillebrunt*, 14 Ib. 812; *Riser v. Snoddy*, 7 Ind. 442. Nor will a part payment. *Miller v. Dorsey*, 9 Md. 817. And see also *Henderson v. Ilsley*, 11 S. & M. (Miss.) 9; *Hazzleton v. Whitesides*, 2 Strobb. (S. C.) 353; *Forney v. Benedict*, 5 Barr (Penn.), 225.]

<sup>2</sup> *Reynolds v. Hamilton*, 7 Watts (Penn.), 420.

<sup>3</sup> *Hammon v. Hunt*, 4 Cow. (N. Y.) 498; *Deyo's Ex'rs v. Jones's Ex'rs*, 20 Wend. (N. Y.) 491.

<sup>4</sup> *Martin v. Williams*, 17 Johns. (N. Y.) 330.

<sup>5</sup> *Dexter v. Penniman*, 8 Mass. 184.

or administrator is sufficient to take a case out of the statute.<sup>1</sup> And so, also, has it been held in Pennsylvania.<sup>2</sup>

269. It is not necessary that the acknowledgment should be made to the creditor himself, or to his executor, for if made to a stranger in the absence of the creditor or his executor, it will defeat the operation of the statute, as raising an implied promise.<sup>3</sup> Admission of indebtedness to and promise to pay the payee of a note have been deemed sufficient to enable the indorsee to avoid the statute.<sup>4</sup>

<sup>1</sup> Recognized in *Emerson v. Thompson*, 16 Mass. 429 ; and in *Peck v. Botsford*, 7 Conn. (N. Y.) 179.

<sup>2</sup> *Jones v. Moore*, 5 Binn. (Penn.) 578. [Payments made to a widow, before her appointment as administratrix, will inure to revive a barred debt as if paid after the appointment. *Townsend v. Ingersoll*, 48 How. Pr. (N. Y.) 276 ; s. c. 12 Abb. Pr. (N. Y.) n. s. 854.]

<sup>3</sup> *Porter v. Hill*, 4 Greenl. (Me.) 41 ; *Whitney v. Bigelow*, 4 Pick. (Mass.) 110 ; *Soulden v. Van Rensselaer*, 9 Wend. (N. Y.) 298 ; *St. John v. Garrow*, 4 Port. (Ala.) 228. [Bloodgood v. Bruen, 4 Sandf. (N. Y.) Sup. Ct. 427 ; *Carshore v. Huyck*, 6 Barb. (N. Y.) Sup. Ct. 583 ; *Watkins v. Stevens*, 4 Ib. 168 ; *Phillips v. Peters*, 21 Barb. (N. Y.) 851 ; *Newkirk v. Campbell*, 5 Harr. (Del.) 380 ; *Collett v. Frazier*, 8 Jones, Eq. (N. C.) 80 ; *Palmer v. Butler*, 86 Iowa, 576 ; *ante*, § 246. But it seems otherwise in England since the Stat. of Geo. IV. c. 14 ; *Grenfell v. Girdleston*, 2 Y. & C. 662 ; *Goate v. Goate*, 37 Eng. L. & Eq. 486. So in Pennsylvania, though the rule is admitted to be different in England and most of the other States. *McKenny v. Sugden*, Sup. Ct. 7 Leg. Gaz. 253, 1875. And in Nevada, *Taylor v. Hendrie*, 8 Nev. 242. And see *post*, § 275, n. And see also *Keener v. Crull*, 19 Ill. 189. And the admission must be made with intent to influence the action of the creditor. *Wakeman v. Sherman*, 8 Selden (N. Y.), 85.]

<sup>4</sup> *Frye v. Barker*, 4 Pick. (Mass.) 382 ; *Little v. Blunt*, 9 Ib. 488 ; *Dean v. Hewett*, 5 Wend. (N. Y.) 257 ; *Howe v. Thompson*, 2 Fairf. (Me.) 152. [*Bird v. Adams*, 7 Ga. 505. But held otherwise in *Thompson v. Gilreath*, 3 Jones (N. C.), Law, 498.] And the indorser is a competent witness to prove the time when the payment was made, provided he has shielded himself from all liability, by ordering the contents of the note to be paid "without recourse," or words equivalent. *Rice v. Stearns*, 8 Mass. 225 ; *Howe v. Thompson*, *supra* ; *Buskins v. Wilson*, 6 Cow. (N. Y.) 471 ; *Barretto v. Snowden*, 5 Wend. (N. Y.) 181 ; and see *Dowling v. Ford*, 1 Mees. & Welsb. (Ex.) 325. [When notes, secured by mortgage, have become barred by the statute, the creditors of the mortgagor may claim the benefit ; nor can any rights acquired by the creditors, by the running of the statute, be affected by a subsequent acknowledgment of the debt by the debtor. *Larthet v. Hogan*, 1 La. An. 380.]

## CHAPTER XXV.

## ACKNOWLEDGMENTS IN WRITING.

270. MR. BROUGHAM,<sup>1</sup> in his speech, delivered in the British House of Commons, on the 7th of February, 1828, on legal reform, in giving a detail of the defects and anomalies of English law, which, in his judgment, required legislative correction, proposed "to prop up the statute of limitations by the statute of frauds," and say that nothing should take the case out of the former but a new promise *in writing*, and thus put an end to absurd and contradictory decisions. In the following May, the act of 9 Geo. IV. c. 14, was passed, which was to that effect, and which was entitled, "An act for rendering a written memorandum necessary to the validity of certain promises and engagements;" and was to commence and take effect on the first of January, 1829.<sup>2</sup> It has been called "Lord Tenterden's Act," from its author, the late learned Chief Justice Tenterden, of the Court of King's Bench. As declared by Mr. Justice Thompson, in giving the opinion of the Supreme Court of the United States, in *Moore v. Bank of Columbia*,<sup>3</sup> "it shows, in a very striking point of view, the sense of the English legislature, of the very great mischief which has resulted from vague and loose declarations, in a great manner to set aside and make void the statute of limitations." "Although," says Chief Justice Shaw, "it does not attempt to define what species or form of acknowledgment shall be sufficient to found a new promise, yet, when parties are compelled to rely upon written acknowledgments, framed for the express purpose of renewing and continuing a promise which has expired, or is about expiring, such acknowledgment may reasonably be expected to be definite in its reference to the debt, security, or promise, intended to be continued in force, and so precise and explicit in its terms of

<sup>1</sup> Since Lord Chancellor Brougham.

<sup>2</sup> See the act in the Appendix, p. cxlv.

<sup>3</sup> *Moore v. Bank of Columbia*, 6 Peters (U. S.), 86.

acknowledgment, as to dispel much of the obscurity which has surrounded other cases, arising upon loose, indefinite, and unguarded verbal admissions.”<sup>1</sup> The act certainly goes to illustrate and confirm the policy of the course which we have shown to have been long pursued by our American courts, in cautiously admitting loose, verbal declarations to take a case out of the statute. In some of the States as we shall presently show, its terms, with slight variation in phraseology, and some qualification, have been already adopted; and, as the example will, there is reason to suppose, be generally followed, the manner in which the act has been construed by the courts in England, though of no direct authority here, will doubtless invite attention, and exert an influence.

271. “Lord Tenterden’s Act” first enacts, as may be seen, “that, in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the said enactments [the statute of James I. and the Irish act of limitations], or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby.” The object in view was the prevention of fraud and perjury in proving an acknowledgment or a new promise, by rendering necessary to procure that in writing for which words were previously sufficient. This was so stated by Lord Tenterden, in *Dickinson v. Hatfield*.<sup>2</sup> The Chief Justice of the Common Pleas also, Tindal, said, in *Hayden v. Williams*,<sup>3</sup> that the statute did not intend to make any alteration in the legal construction to be put upon acknowledgments or promises made by the defendants, but only to require a *different mode* of proof. “To inquire, therefore,” he proceeded to say, “whether, in a given case, the written document amounts to a written acknowledgment or promise, is no other inquiry than whether the same words, if proved, before the statute, to have been spoken by the defendant, would have had a similar operation and effect.” The legal effect of the acknowledgment or promise, as to how far it may be considered as admitting a debt to be due or amounting to a promise to pay it, is a question of law for the

<sup>1</sup> In *Sigourney v. Drury*, 14 Pick. (Mass.) 889.

<sup>2</sup> *Dickinson v. Hatfield*, 5 Carr. & Payne, 46.

<sup>3</sup> *Hayden v. Williams*, 7 Bing. 168.

determination, of the court;’ but extrinsic facts are for the jury.<sup>2</sup> In an action by the payee against the maker of a promissory note, the plaintiff, to rebut a plea of the statute, proved the fact of a payment on account of the note within six years, and further proved a parol admission by the party paying that he made this payment. This admission, it was held, was rightly received in evidence to corroborate the direct proof of the fact of payment, as Lord Tenterden’s Act merely excludes an acknowledgment of the debt by “words *only*.”<sup>3</sup>

272. The act requires a signing *by the party chargeable*. The writing must be *signed* by the party; and it is not sufficient that it is in his handwriting.<sup>4</sup> It has already been shown,<sup>5</sup> that, in the absence of any legislative enactment to the contrary, an acknowledgment by an agent of the debtor, — such a one as would be binding upon the principal if directly made by him, — is sufficient to take a case out of the statute. But, looking at the words of the act of 9 Geo. IV., the act is confined in terms to writings signed *by the party* chargeable thereby. It appears, says Chief Justice Tindal, that the legislature well knew how to express the

<sup>1</sup> Snook v. Mears, 5 Price, 686.

<sup>2</sup> Morrell v. Smith, 8 Mees. & Welsb. (Ex.) 402; 8 Carr. & Payne, 246.

<sup>3</sup> Bevan v. Gelhing, 8 Gale & Dav. 59. [In 1835, A brought an action on a promissory note, upon which neither principal nor interest had been paid since 1828. In 1832, the administrator of the maker of the note returned, under citation, an inventory and account of the late debtor’s assets and debts in which A’s debt was entered. It was held that this entry was sufficient under Lord Tenterden’s Act to take the case out of the statute. Smith v. Poole, 12 Sim. 17. And see Woolbridge v. Allen, 12 Met. (Mass.) 470; §§ 282 and 288, *ante*. The making of one note, and tendering it to the holder of another, in payment, pursuant to an agreement between them, is not such an acknowledgment or promise to pay in writing as will take the second note out of the statute. Smith v. Eastman, 8 Cush. (Mass.) 355. A and B had an unsettled account. In 1845, A signed the following agreement: “It is agreed that B, in his general account, shall give credit to A for £147 for bricks delivered in 1834.” A died in 1847, having charged by his will his debts on his real estate, and a suit was instituted for the administration of his estate. Held, that this was not such an acknowledgment, under § 1 of Lord Tenterden’s Act, as to give B a right to an account against A’s estate for more than six years before A’s death. Hughes v. Paramore, 35 Eng. L. & Eq. 195. A recital in a mortgage that it is made subject to a prior mortgage executed by the mortgagor and existing on the same premises, is insufficient as an acknowledgment of indebtedness on the prior mortgage, if made before the statute has run against the prior mortgage, to take it out of the statute either as against the mortgagor or his subsequent grantees. Palmer v. Butler, 36 Iowa, 576. Otherwise if the promise be made after the statute has run. Day v. Baldwin, 34 Iowa, 380.]

<sup>4</sup> Barley v. Ashton, 12 Adol. & Ell. 493.

<sup>5</sup> See Ch. XXIV., § 261.

distinction between a signature by the party and a signature by his agent; and that when it appeared, in the act in question, "that it expressly mentions the signature of the party only, we think it a safer construction to adhere to the precise words of the statute, and that we should be *legislating*, not interpreting, if we extended its operation to writings signed, not by the party chargeable thereby, but by his agent." In this case, the debtor's wife wrote a letter to the creditor, in her husband's name, and at his request, proposing to pay a debt by instalments; and the decision was, in conformity to the just-mentioned construction, that the promise was not sufficient, because not signed by the "party chargeable."<sup>1</sup>

273. The construction has been, that the debtor must be *personally* chargeable. In a case where a letter was put in, addressed by the defendant to the plaintiffs, the effect of which was, "there are certain accounts due me, get them if you can," the question was, whether the party had charged himself; and it was held that he had not.<sup>2</sup> Lord Denman, Ch. J., and Coltman, J., in this case, held that *Whippy v. Hillary*,<sup>3</sup> was quite in point, in which there was a clear acknowledgment, but the defendant pointed out a particular fund in the hands of trustees; and by Lord Chief Justice Tenterden: "The words of the act are, 'unless such acknowledgment or promise be made or contained by or in some writing to be signed by the party chargeable thereby.' The defendant himself must be chargeable by the instrument relied upon to bar the statute." By Patterson, J.: "It is clear the defendant did not mean to render himself *personally* chargeable; he only refers to others, by whom the debt is to be paid."

274. Before Lord Tenterden's Act, if there were mutual and reciprocal accounts with any item on either side within six years, there was a bar to the statute, because every new item and credit implied an admission of the justice of the accounts (see *ante*, Ch. XIV.); and in such case the admission might have been proved under the common replication, that the cause of action did accrue within six years. But as that act requires either a part payment

<sup>1</sup> *Hyde v. Johnson*, 2 Bing. (New Cases) 776. This case was cited as authority in *Clarke v. Alexander*, in 1844, in which it was held that the signature of a clerk was not sufficient. 8 Scott (New), 147.

<sup>2</sup> *Routledge v. Ramsay*, 8 Adol. & Ell. 221.

<sup>3</sup> *Whippy v. Hillary*, 5 Carr. & Payne, 209.



or an acknowledgment *in writing*, signed by the party chargeable, it is now well established, that no such mutual and reciprocal, or cross-accounts, as such, are of any avail (unless in writing, and signed by the party charged) to save the statute, either on the ground of their being an acknowledgment of the debt, or as amounting to evidence (by way of admission) of part payment,<sup>1</sup> as they only are available when they come within the exception of merchants' accounts; and therefore it is that *even a parol statement of accounts*, made within the six years, will not bar the statute, if the original cause of action be more than six years old, as such account stated merely amounts to a promise to pay the old debt, which should be in writing, according to the provision of the act. And such account stated cannot of itself be sued upon as a new promise for want of a consideration to support it.<sup>2</sup> Though if the account stated, or any other subsequent promise by parol, were upon a new consideration, sufficient to support it, it would amount to a new and independent contract, and might be declared on accordingly.<sup>3</sup>

275. The statute enacts, that no joint contractor, or the executors or administrators of any such joint contractors, shall lose the benefit, so as to be chargeable by any written acknowledgment or promise, signed by the others of them; but nothing shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever. Another section (3d) provides that no indorsement of payment, or any security, shall be deemed sufficient proof of such payment, to take the case out of the operation of the statute.<sup>4</sup> By the construction which these enactments, thus taken together, have received in England,<sup>5</sup> one joint contractor cannot prevent the other from taking advantage of the statute of limitations by any species of acknowledgment, *except* by part payment of principal and interest. The law laid down in *Whitcomb v. Whiting*, in respect to joint contractors, is

<sup>1</sup> *Williams v. Griffiths*, 2 Crompt., Mees. & Rosc. 45; *Cottam v. Partridge*, C. P. 20; L. J. R. 162. [So in Massachusetts, *Chace v. Trafford*, 116 Mass. 529.]

<sup>2</sup> *Tarbuck v. Bispham*, 2 Mees. & Welsb. per Parke, B.; *Jones v. Ryder*, 4 Mees. & Welsb. 32; *Mills v. Fowles*, 5 Bing. (New Cases) 455.

<sup>3</sup> See *Browne on Actions*, 67, and No. 188 Law Library, 54, and *Reeves v. Hearne*, 8 Crompt., Mees. & Rosc. 828.

<sup>4</sup> The author has been aided in obtaining the authorities on this branch of the act by an article in the eighth volume of the *London Monthly Law Magazine*.

<sup>5</sup> 8 Lond. Monthly Law Mag. (1840) p. 201.

unaffected, inasmuch as the effect of part payment is expressly saved.<sup>1</sup> The decision in *Wyatt v. Hodson*<sup>2</sup> was, that payment of interest within six years, by one of several joint contractors, took the case out of the statute as to all. It was, notwithstanding, urged for the defendant, that the 9th Geo. IV. c. 14, or Lord Tenterden's Act, which had enacted that even an *actual* promise to pay should revive a debt at the end of six years, unless such promise were in writing, could never intend to give a greater effect to an *implied* promise. The payment of interest was only an acknowledgment from which a *promise* to pay might be *implied*; and though, by an exception in the act, it is declared, that payment of interest by any person whatsoever should prevent the time of limitation from taking effect, yet it was said, that that must be confided to the individual paying, or an executor or administrator of such person. If a joint contractor, in other words, cannot bind his co-contractor by an express promise in writing, why should he be said to do so by the payment of a small sum for principal or interest, which raises but an *implied* promise? The court were, however, clear in their opinion, that the defendant was not protected by the act, and that the effect of part payment was not confined to the individual making it; that the payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill-interpreted; while money is not usually paid without deliberation; and payment is an unequivocal act, and (by Park, J.) *Whitcomb v. Whiting* is a governing case. "When," says Alderson, J., "the act passed, the case of *Burleigh v. Stott*<sup>3</sup> had decided, that payment on account by one of many joint contractors should have the effect of fixing them all; and the act says, that the effect of such an acknowledgment shall not be lessened." By Tindal, Ch. J.: "On the broad construction of the act, we think payment of money by one of several joint contractors an acknowledgment not within the mischiefs or the remedy provided by the legislature against the effect of an oral promise."<sup>4</sup>

<sup>1</sup> See *ante*, Ch. XXIII. § 248.

<sup>2</sup> *Wyatt v. Hodson*, 8 Bing. 809 (1832).

<sup>3</sup> *Burleigh v. Stott*, 8 Barn. & Cress. 86.

<sup>4</sup> [Part payment by a partner after dissolution prevents the bar of the statute, provided the creditor have no notice of the dissolution. *Tappan v. Kimball*, 10 Foster (N. H.), 126; *Kenniston v. Avery*, 16 N. H. 117; *Sage v. Ensign et al.*, 2 Allen (Mass.), 246. Especially if the partner be authorized to settle in liquidation. *Kauf-*

276. Not only is part payment of principal or interest by one joint contractor, as well since as before Lord Tenterden's Act, sufficient to take the case out of the statute, but the allowing credit for interest in an account, being equivalent to its payment, is also sufficient to defeat the operation of the statute.<sup>1</sup>

277. The point raised in *Channel v. Ditchburn*<sup>2</sup> was, whether payment of interest by one of a joint and several promissory note was sufficient to take the case out of the statute of limitations, against the other, even though the payment be not made within six years after the first accruing of the cause of action. Parke, B., in delivering the judgment of the court, said that cases had been relied on as distinguishing this case, and throwing discredit on the authority of *Whitcomb v. Whiting*; and it seemed a strong position to say, that a party who joins with another in making a joint and several promissory note, by that act, endows the other, his agent, with authority, by payment of interest or principal, to make a fresh contract for him. But, since that case, the court of Queen's Bench had twice decided,<sup>3</sup> that a part payment by a joint contractor takes the case out of the statute, and thus confirmed the authority of *Whitcomb v. Whiting*. It is said, however, continued the learned judge, that a distinction arises in this case from the fact of the statute having run out before the payment was made; but, on looking at the paper book in the case of *Manderston v. Robertson*,<sup>4</sup> it appears the payment in that case was made after

*man v. Fisher*, 8 Grant (Penn.), 302. *Pitts v. Hunt*, 6 Lan. (N. Y.) 146. And where two joint promisors of a note refer the holder to a third promisor, who pays the interest, the payment takes the note out of the statute as to all. *Winchell v. Bowman*, 21 Barb. (N. Y.) 448. But see *contra*, *Smith v. Townsend*, 9 Rich. (S. C.) 44, and *ante*, § 260, note. The indorser of a note payable to another is such a joint promisor. *Perkins's Adm'r v. Brastow*, 6 R. I. 505. Part payment by one joint debtor at the request of another takes the case out of the statute as to both. *Monro v. Potter*, 34 Barb. (N. Y.) 358. The payment of interest by the principal debtor binds the sureties. *Lawrence Co. v. Domtale*, 35 Mo. 395; *Whittaker v. Rice*, 9 Min. 13. And where sureties are called on for payment, and they refer to the principal, who pays, the payment binds them. *Winchell v. Hicks*, 18 N. Y. (4 Smith) 558. In England now, by Stat. 19 & 20 Vict. c. 97, § 14, part payment of "principal, interest, or other money," by one co-contractor, his executors or administrators, does not bind the other. And, since this statute, it seems, that express consent will make no difference. *Jackson v. Wooley*, 8 Ell. & B. 778.]

<sup>1</sup> *Pearne v. Hurst*, 10 Barn. & Cress. 122.

<sup>2</sup> *Channel v. Ditchburn*, 5 Mees. & Welsb. (Exch.) 494.

<sup>3</sup> In *Burleigh v. Stott*, *supra*, and in *Manderston v. Robertson*, 4 Man. & Ry. 440.

<sup>4</sup> *Supra*.

the statute had run out. The case of *Whitcomb v. Whiting* must, therefore, still be considered as good law.<sup>1</sup>

278. As an acknowledgment of part payment must be in writing, and signed by the party chargeable thereby (though the *appropriation* of such part payment may be proved by parol declarations), a question has arisen whether, as under the *statute of frauds*, a party would be bound, if such acknowledgment (be it of part payment or of a promise of payment) were signed by an *agent*. This question arose in *Hyde v. Johnson*,<sup>2</sup> and the court there held, that an acknowledgment by the agent of the debtor would not revive a debt by the statute of limitations, and that such acknowledgment must be signed by the debtor himself. "There are no words in the first section that would seem to authorize the signature of an agent as being sufficient to save the statute; and it is equally clear, that where the legislature intended that such should be the case, as in the eighth section in regard to executory contracts, it had no difficulty in pointing out the distinction, and expressly legalizing contracts signed by principals or agents thereunto lawfully authorized."

279. The third section of Lord Tenterden's Act enacts, that no indorsement or memorandum of any payment written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on the behalf

<sup>1</sup> It is clear, therefore, it has been said, that the courts are not inclined to disturb the case of *Whitcomb v. Whiting*, notwithstanding the hardship it seems to inflict on joint contractors. It is important, in considering *Whitcomb v. Whiting*, to remember that that was a case of *payment* on account and not of mere *acknowledgment*, as it purports to be by the marginal note; and that although *part payment* will still keep alive a debt as against a joint contractor, yet that this does not apply to acknowledgments or promises by joint contractors. The first clause in the 9 Geo. IV. c. 14, will render it necessary that the plaintiffs should act with extreme care and caution in adopting proceedings where there are two or more joint contractors or the personal representative of any contractor, for not only will the joint contractor or personal representative be not bound by the written acknowledgment or promise signed by his co-contractor or joint representative; but if an action be commenced against them, and it shall appear at the trial or *otherwise* (it is so expressed in the statute) that one of the defendants has signed, but not the others, though the plaintiffs may recover against those who have signed, yet judgment shall be given and *costs* allowed for the defendants who have not signed. As it is certain that part payment will take the case out of the statute, whether in the case of joint contractors or otherwise, it is deserving of consideration how the payment is to be established in evidence. 8 Lond. Monthly Law Mag. 203, 204.

<sup>2</sup> *Hyde v. Johnson*, 2 Bing. (New Cases) 776.

of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes. (That is, either out of the English statute of 21 Jac. I. or the Irish statute of 10 Car. I.) The construction of this statute has been, 1st. It must appear that the payment was made on account of a larger debt; 2d. That it is the debt sued for; 3d. A verbal acknowledgment of part payment is insufficient, though, if the payment be proved *aliunde*, its appropriation may be proved by parol declarations. Parke, B., in *Tippetts v. Hearne*,<sup>1</sup> is reported to have said, to take a case out of the statute by part payment, it must be first shown, that the part payment was on account of a larger debt, the principle on which it takes it out being that it admits a greater debt to be due at the time; secondly, it must be shown to have been a payment in part discharge of the particular debt sued for;<sup>2</sup> thirdly, *Willis v. Newman*<sup>3</sup> establishes that a verbal acknowledgment of the payment of part of a debt within six years is not sufficient, within the 9 Geo. IV. c. 14, to take the case out of the statute of limitations.<sup>4</sup>

It is clear, if the fact of payment be distinctly proved, the *appropriation* of the payment to the debt in respect of which it is paid may be proved by a parol admission.<sup>5</sup> The marginal note in the case just cited is, though a verbal acknowledgment of part payment of a debt, or of payment of interest thereon is insufficient within the act, to take the case out of the statute of limitations; yet, if the payment of money is proved as a fact, and not by a mere admission, its appropriation to a particular amount may be shown by the declaration of the party making the payment, and such declarations need not have been made at the time of such payment.

280. One very important difference between the Virginia statute,<sup>6</sup> respecting acknowledgments and new promises in writing, and

<sup>1</sup> *Tippetts v. Hearne*, 4 Tyrw. 775.

<sup>2</sup> 1 Starkie, 488.

<sup>3</sup> *Willis v. Newman*, 8 Younge & Jer. 518; 4 Tyrw. (Ex.) 179, 960.

<sup>4</sup> "We confess that, but for this decision on the point" (says the English law critic from whom we obtained these authorities, in a note), "we should have thought that, as before the statute, a parol admission of part payment would have been sufficient; and, as the makers of the statute refrained from legislating on the effect of part payment, so a parol acknowledgment of part payment would have been as effectual now as it was previously to the passing of the 9 Geo. IV. The authority of the last-mentioned case is, perhaps, somewhat doubtful." 8 Lond. Monthly Law Mag. 204.

<sup>5</sup> *Waters v. Tomkins*, 1 Tyrw. & Gran. 189; 2 Crompt. Mees. & Rosc. (Ex.) 726.

<sup>6</sup> See Appendix, p. cxlv.

Lord Tenterden's Act, is the requirement of the former contained in the clause declaring that every written promise or acknowledgment shall be held to be a *drawing down of the original debt*, to the date of the acknowledgment or promise. This, it will be perceived, is in direct opposition to the rule which, as has already been pointed out, has been firmly established by the concurrent authority of the Federal and local courts of this country, as well as by the judicial tribunals of England. One of the consequences of it plainly is, as has been asserted,<sup>1</sup> that a conditional promise is equally effectual as a promise without condition, though the performance of the condition should not be shown. "Now, very justly," says the author just referred to, "the courts of Virginia are driven back by the proviso of the statute to the doctrine of the former cases, and it would seem, on principle, that they ought to modify the forms of pleading so as to correspond with the doctrine, as they heretofore discarded the doctrine because it conflicted with the forms of pleading."<sup>2</sup> The author's remark made in the course of his comments upon the clause in question of the Virginia statute, that, "if it shall be carried into full effect, it will contribute as much to thwart the policy of the statute of limitations, as the rest of the act will be to advance it," is undeniable. There is yet another important difference, though one not so surprising as the one just pointed out, and this is in respect to part payment. It has been shown above, that the doctrine upon this subject has been left by Lord Tenterden's Act as it stood previously. The proviso in that act, that "nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever," is in the Virginia statute altogether omitted.

281. Lord Tenterden's Act has been substantially adopted in Massachusetts,<sup>3</sup> with a judicious supplement. By the construction of the former, as above given, one joint contractor, though he cannot prevent another from taking advantage of the statute of limitations, by any other species of acknowledgment, he may do so by part payment of principal or interest. The Massachusetts statute, on the contrary, expressly declares, that if there be two or more joint contractors, no one of them shall be chargeable by reason of

<sup>1</sup> Essay on the Act of Virginia, founded on the English statute of 9 Geo. IV. c. 14, by William T. Joynes, 216.

<sup>2</sup> Ibid. 225.

<sup>3</sup> See Appendix, p. li., lii.



any payment made by any other or others of them. The enactments founded upon the policy of Lord Tenterden's Act, in Vermont<sup>1</sup> and Michigan,<sup>2</sup> do not appear to vary from those in Massachusetts; but between those of Massachusetts and those of Maine,<sup>3</sup> there appears to be this difference; namely, in the latter State the promise or acknowledgment in writing allowed as evidence of a new or continuing contract shall be an *express* one. The statute of Wisconsin<sup>4</sup> has all the provisions of the statute of Massachusetts, in respect to joint contractors and part payment, but no promise in writing is required. The words "by words only," in the English act, are omitted in all the before-mentioned American acts, except in that of Virginia.

282. In Massachusetts, where a promissory note, made and delivered as a settlement of a demand barred by the statute, is given up to the maker by the payee, for the purpose of restoring all matters between the parties to the state they were in before the note was given, the act of making and delivering such note is not competent evidence to take the original demand out of the operation of the statute. It was the duty of the court to say, that there was no sufficient evidence of any acknowledgment or promise *in writing*, signed by the party to be charged thereby, to avoid the effect of the statute.<sup>5</sup>

283. Part payment, by a sole debtor, continues to have the same effect in Massachusetts it had before the provision of the Revised Statutes. Therefore, it was held, that a negotiable note given by a debtor for part of a debt, being payment of such part, takes the debt out of the operation of the statute. The giving of one's own negotiable note, say the court, for part of a simple contract debt for money paid, is a part payment of such debt. The effect was the same as if the amount had been paid in bank-notes or coin. Though the note in question was not considered as a *promise in writing* to pay the whole debt, it was of itself *de facto* a *payment* of part, and so by force of the statute the case was taken out of its operation.<sup>6</sup>

<sup>1</sup> Appendix, p. xliii.

<sup>2</sup> Ibid. p. cxxxi.

<sup>3</sup> Ibid. p. xxxiv.

<sup>4</sup> Ibid. p. cxxxvii.

<sup>5</sup> Sumner v. Sumner, 1 Met. (Mass.) 1. *Aliter*, it seems, if the note be given up for the purpose of leaving open the question of the amount due to the payee, and not the question of the maker's being indebted to him.

<sup>6</sup> Ilsley v. Jewett, 2 Met. (Mass.) 168.



284. In respect to joint contractors: Where a minor made a payment in a joint note given by him and an adult, and, after coming of age, made an oral promise to pay the balance, he did not thereby so ratify his former payment as to take the note out of the operation of the statute, as to the adult, but only as to himself.<sup>1</sup>

<sup>1</sup> *Pierce v. Tobey*, 5 Met. (Mass.) 162.

## CHAPTER XXVI.

## PLEADING THE STATUTE IN ACTIONS EX CONTRACTU, AT LAW AND IN EQUITY.

285. It was first ruled, that, as the statute prohibited actions from being brought beyond a certain period from the time when the cause of action accrued, it was to be taken as an absolute bar, and operated by its own force, and without pleading it.<sup>1</sup> Afterwards the judges were equally divided in opinion on the question.<sup>2</sup> But as the doctrine, when applied to a case merely because it appeared on the face of the declaration, that the action was commenced beyond the time prescribed by the statute, was seen to be clearly untenable, as the plaintiff might be within some of the various exceptions mentioned in the statute, it was overruled,<sup>3</sup> and has so continued.<sup>4</sup> That the statute must be pleaded, even where the cause of action appears on the face of the declaration, to be out of time, has been confirmed in a late case in England, where on a promissory note, sixteen years old, and payable with interest, the

<sup>1</sup> *Brown v. Hancock*, Cro. Car. 115.

<sup>2</sup> *Frankersley v. Robinson*, Cro. Car. 168.

<sup>3</sup> *Stile v. Finch*, Cro. Car. 404.

<sup>4</sup> *Bricket v. Davis*, 21 Pick. (Mass.) 404; *Gould v. Johnson*, 2 Lord Raym. 838; *Puckel v. Moore*, Ventris, 191; *Pearsall v. Dwight*, 2 Mass. 87; *Jackson v. Varick*, 2 Wend. (N. Y.) 294; *Chambers v. Chambers*, 4 Gill & Johns. (Md.) 349; *Merryman v. The State*, 5 Har. & Johns. (Md.) 425; *Robbins v. Harvey*, 5 Conn. 385; *Kirkman v. Siboni*, 4 Mees. & Welsb. (Ex.) 339. [*Parker v. Irwin*, 47 Ga. 405; *Pegram v. Stoltz*, 67 N. C. 144. And the defendant need not negative the exceptions; but the plaintiff must reply them. *Ford v. Babcock*, 2 Sandf. (N. Y.) Sup. Ct. 518; *Walker v. B. R. of Miss.* 2 Eng. (Ark.) 503. In Texas, if the action appear to be barred, the plaintiff must aver a new promisor, or that the defendant is within some of the exceptions, or the defendant may demur. *Coles v. Kelsey*, 2 Texas, 541. If it does not appear by the declaration whether the claim is barred or not, the defendant must plead. *Frosh v. Sweet*, 2 Texas, 485; *Davenport v. Short*, 17 Minn. 24. If it does appear that the claim is barred, the defendant may demur or waiver by setting up the statute. *Moulton v. Walsh*, 30 Iowa, 361; *Hudson v. Wheeler*, 34 Tex. 356. If, however, he does neither, he waives the defence. *Sturges v. Burton*, 8 Ohio St. 215.] The plea of the statute is generally a personal privilege, but grantees, mortgagees, or other persons standing in the place of the party having the personal privilege may interpose the plea. *Lord v. Morris*, 18 Cal. 482; *Skedmore v. Romaine*, 2 Bradf. (N. Y.) 122.

plaintiff averred that the defendant did not pay the same and interest, or any part thereof, *except some interest within six years*, and the defendant pleaded the statute; it was held, on demurrer, a good bar, as the allegation of the payment of the interest introduced in the declaration was premature, and that a payment is but evidence to show that, *prima facie*, there exists a cause of action.<sup>1</sup> The statute being a strict defence, if the party omit to plead it, the court will not relieve him by permitting him to amend by adding the plea.<sup>2</sup> The only exception to the rule is in cases where the statute itself authorizes the general issue;<sup>3</sup> and the general issue was allowed in a justice's court in which the practice was to admit every thing under that plea, except matter of abatement.<sup>4</sup>

286. According to Mr. Sergeant Williams, there is the same reason for pleading the action in *debt* as in *assumpsit*; though the contrary was formerly held. He says, if the statute be not pleaded in the former, the plaintiff is equally liable to be surprised, and therefore as unprepared in one action as in the other, to answer

<sup>1</sup> *Hollis v. Palmer*, 8 Scott (C. B.), 265; 2 Bing. (New Cases) 713.

<sup>2</sup> *Jackson v. Varick*, 2 Wend. (N. Y.) 294. The action for *mesne profits* forms no exception to the rule. The plea of the statute cannot be amended, though the amended plea is filed before the rule day has expired. But if a plaintiff amends his declaration, the defendant may plead the statute anew. *Johnson v. Green*, 4 Gill & Johns. (Md.) 381. [*Reed v. Clarke*, 8 McLean (U. S.), 480; *Nelson v. Bond*, 1 Gill (Md.), 218. Nor will a default be taken off to allow the plea of the statute to be made. *Shutz v. Baldwin*, 12 Ohio, 120; *State v. Jennings*, 5 Eng. (Ark.) 428. Nor will the court set aside a judgment to allow devisees to plead the statute, the executor having neglected to do it. The executor is not bound to plead the statute to a debt which he deems to be justly due. *Walton v. Radcliffe*, 2 Des. (S. C.) 577; *Bird v. Harose*, Spears (S. C.), Ch. 250; *Leigh v. Smith*, 8 Ired. (N. C.) Ch. 442. And see *ante*, § 170, note. But the court will sometimes allow amendments to avoid the plea. *Crawford v. Cocks*, 8 Eng. L. & Eq. 594. In *Wiley v. Yule*, 1 Met. 353, the court, in an action for a penalty, refused to allow an amendment changing the form of the action. The plea, though in general a personal one, may nevertheless be set up by any one interested in the claim against which it is to be set up. *Fergusson v. Brown*, 1 Bradf. (N. Y.) 10; *Skidmore v. Romaine*, 2 Ib. 122; *Larhet v. Hogan*, cited *ante*, § 269, note; *Dawson v. Callaway*, 18 Ga. 573. But see *Briggs v. Wilson*, 39 Eng. L. & Eq. 62; *Elkinton v. Newman*, 20 Penn. (8 Harris) 281; *Biddle v. Moore*, 8 Barr (Penn.), 161. And a grantee may reply an exception, which his grantor might have replied. *Ford v. Laugee*, 4 Ohio (N. S.), 464.]

<sup>3</sup> *Merceron v. Merceron*, 5 Dowl. 271.

<sup>4</sup> *Williams v. Root*, 14 Mass. 273. It was formerly the practice in pleading the statute to recite it at large. But it has been long since it has been required, or has been usual. On setting aside an inquest regularly obtained, the defendant will be allowed to withdraw the plea of the statute, in analogy to the practice on opening a default, and permitting a defendant to plead. *Fox v. Baker*, 2 Wend. (N. Y.) 244.

infancy, coverture, &c., which would take the case out of the statute. If the defendant intends to insist upon the statute (though he may waive it if he choose), he should plead it to prevent surprise, and if he do not do so, it is presumed he intends to waive it.<sup>1</sup>

287. The pleas in an action of assumpsit are *non assumpsit infra sex annos*, and *actio non accrevit infra*, &c. In many cases the first is no answer, and is, therefore, not applicable; because the statute operates as a bar only from the time the cause of action arose, and not from the time of making the promise, the words being "within six years next after the cause of such action or suits, and not after." Hence, it is of no consequence (if the cause of action accrued within six years) when the promise was made.<sup>2</sup> Besides, it is admitted by this plea that a cause of action did subsist before six years.<sup>3</sup> In the case of promissory notes on demand, and in all others, where the debt and promise existed at the same moment, the plea of *non assumpsit infra sex annos* will be proper and safe.<sup>4</sup> But the plea is demurrable if used in an action upon promises to pay money, or do any act, at a future period.<sup>5</sup> It is no answer to a count on a promissory note payable at a day subsequent to its date.<sup>6</sup> The plea of *actio non accrevit infra sex annos*, on the other hand, is appropriate in all cases, and is the most preferable mode of pleading the statute in assumpsit.<sup>7</sup> The plea in assumpsit, of *non assumpsit*, &c., corresponds to the

<sup>1</sup> Hodson v. Harridge, 2 Wms. Saund. 686, note 1; Pearsall v. Dwight, 2 Mass. 87.

<sup>2</sup> Gould v. Johnson, 2 Salk. 422.

<sup>3</sup> Bland v. Haselrig, 2 Ventris, 151.

<sup>4</sup> Buckler v. Moore, 1 Mod. 89.

<sup>5</sup> Chitty on Contracts.

<sup>6</sup> Stillwell v. Hasbrouck, 1 Hill (N. Y.), 561; United States v. White, 2 Ib. 59.

Though a demurrer is interposed to the defendant's plea of non assumpsit, he will still prevail, if the count to which the plea relates be bad in substance. United States v. White, 2 Hill (N. Y.), 59.

<sup>7</sup> The plea of *non assumpsit infra sex annos*, is only applicable to cases on considerations executed; for, if the action be on an *executory consideration*, such plea would be bad, for it is not material when the promise was made, if the cause of action accrue within six years; and, therefore, in such case, *actio non accrevit infra sex annos* is the proper plea. 2 Salk. 422; Esp. N. P. 156. In *indebitatus assumpsit*, therefore, the plea would be good, because it shows a debt at the time of the promise. However, though the plea be good in such case, yet the plea of *actio non accrevit infra sex annos*, is also proper; therefore it seems the safest and best way of pleading the statute, in all cases of debt on simple contract on assumpsit, to say that "the said several causes of action in the said declaration mentioned, or any or either of them, did not accrue to the said plaintiff within six years next before the commencement of the action aforesaid, of the plaintiff," &c. Story's Pleading, 76; 2 Saund. 68 c. (Wms. note 6).

plea of *nil debet infra sex annos* in debt upon simple contract ; and the plea of *causa actionis non accrevit infra sex annos* is as proper in debt as in assumpsit, and is pleadable to any form of action *ex contractu*.

288. In declaring in the case of a new promise or acknowledgment, the declaration is upon the original promise. In an action of assumpsit upon a bill of exchange to which the statute was pleaded, it was objected, that the plaintiff ought to declare specially on the new promise or acknowledgment. Lord Ellenborough said : " As to the form of declaring insisted on, it is enough to say that it has never been in use, and that it is the common practice to declare on the original contract, and, if the statute be pleaded, the only question is, whether the defence given by it has been waived."<sup>1</sup> In a later case, Best, Ch. J., said : " We have every wish to give full effect to the statute. Probably the new promise ought in strictness to be declared on specially, but the practice is inveterate the other way, and we cannot get over it."<sup>2</sup> When the statute is pleaded, the plaintiff may, therefore, reply the new promise, and when the pleadings assume this shape, the original promise is apparently the cause of action ; but it is the new promise alone that gives it vitality, and that, substantially, is the cause of action.<sup>3</sup>

289. In *Green v. Crane*,<sup>4</sup> which was an action brought by an

<sup>1</sup> *Leaper v. Tatton*, 16 East, 420.

<sup>2</sup> *Upton v. Else*, 12 Moore, 303, and 22 Eng. Com. Law, 451. So is the settled practice in Massachusetts, *Little v. Blunt*, 9 Pick. (Mass.) 488, and is according to the established rules of pleading. *Ibid.* [But in Georgia, the declaration must be upon the new promise, setting out the original debt as the inducement. *Minter v. Broach*, 6 Ga. 21. And so it seems in South Carolina. *Sims v. Radcliffe*, 8 Rich. (S. C.) 287. So in Texas. *Coles v. Kelsey*, 2 Texas, 541. And to the same effect is *Kampshall v. Goodman*, 6 McLean, 189.]

<sup>3</sup> Per Wilde, J., in giving the opinion of the court in *Little v. Blunt*, *supra* ; *Baxter v. Penniman*, 8 Mass. 133 ; *Fisk v. Needham*, 11 Ib. 452 ; *Brown v. Anderson*, 18 Ib. 201 ; *Livingston v. Ostrander*, 9 Wend. (N. Y.) 306 ; *Barrett v. Barrett*, 8 Greenl. (Me.) 355.

<sup>4</sup> *Green v. Crane*, 2 Lord Raym. 1101. And see the same point in *Kinder v. Paris*, 2 H. Blackf. 562 ; *Pitman v. Foster*, 1 Barn. & Cress. 248 ; *Ward v. Hunter*, 6 Taunt. 210. Where to a declaration of an action of *assumpsit*, by the assignees of an insolvent debtor, for money due to him before his insolvency, stating all the promises to have been made to the plaintiffs as assignees ; the defendant pleaded, that he did not undertake a promise in manner and form, as the plaintiffs had complained against him, at any time within six years ; and the plaintiffs replied, that, when the causes of action first accrued to them, the defendant was beyond sea, and that within six years after his return they sued out their original writ against him ; to which the defendant rejoined, that the cause of action first accrued to the insolvent before the plaintiffs

*executor*, upon a promise to his testator to which the defendant pleaded the statute, it appeared in evidence, that, after the death of the testator, and after six years from the time of the contract, the defendant acknowledged the debt to the executor, and promised to pay it. The action, it was held, could not be maintained, the promise to the testator *not falling within the issue*. In *Jones v. Moore*, in Pennsylvania,<sup>1</sup> the action was also brought by an executor upon promises to his testator, and to take the case out of the statute, evidence was given of a new promise to the executor. In the opinion of the court, the evidence did not maintain the issue, which was upon a promise to the testator. Breckenridge, J., however, expressed himself of opinion that the acknowledgment or new promise ought *to be replied*; such a replication would be no departure, and the evidence would be admissible. He was clear, that such a special replication could not but be maintained. The Supreme Court of Massachusetts have been unable to perceive the technical difficulty in the class of English cases above referred to, and the practice in that State has always been to declare on the original promise. In the case of an acknowledgment by an executor or administrator of the debtor, it is not necessary to declare on his implied promise of the executor or administrator, and such an *implied* promise, say the court, could not be supported on the ground of a new consideration, as an independent substantive promise; and the promise being implied from the original consideration, it is necessary to declare on the original consideration. But, says Wilde, J., in giving the opinion of the court, "although this seems the proper form of declaring, yet the new promise, whether express or implied, actually gives the remedy and is substantially the cause of action."<sup>2</sup> That it is important that the pleadings should be moulded to the new principle of a new promise is clearly undeniable.<sup>3</sup>

290. Where a plea of non assumpsit was put in instead of a

became assignees, and that six years had elapsed after the cause of action first accrued to the insolvent. It was held, that there was a departure. *Kinder v. Paris*, *supra*.

<sup>1</sup> *Jones v. Moore*, 5 Binn. (Penn.) 578.

<sup>2</sup> *Little v. Blunt*, 9 Pick. (Mass.) 488. Where a defendant, in an action *ex contractu*, relies on the statute, but judgment is rendered against him, on proof of his having made a new promise which removed the statute bar, the judgment is considered as rendered on the old contract. *Ilsey v. Jewett*, 8 Met. (Mass.) 439.

<sup>3</sup> See opinion of Gibson, Ch. J., as given *ante*, Ch. XXIV. § 256.

plea of non accrevit, and the plaintiffs replied a new promise, and gave evidence in support of the replication, on the trial of the cause, the issue, though informal, was held to be material, and the defect was cured by the verdict. Neither the original promise nor the accruing of the action was within six years of the commencement of the suit; and the plaintiff expected to recover on a new promise or acknowledgment of the debt within that period. The fact to be tried — the renewal of the demand by the new promise — was considered at issue by the parties, and the court were, therefore, disposed to regard the pleadings as having terminated in an informal rather than an immaterial issue.<sup>1</sup>

291. A replication to a plea of non assumpsit, *infra*, &c., that within six years before the commencement of the suit, the defendant promised, &c., stating the day on which the *capias* issued, without showing its return, or connecting it with subsequent processes, is good; such allegation of the issuing of the *capias* being mere surplusage. It is only when the suing out of a *capias to save the statute* is replied, that it is necessary to set forth the return, and by regular continuances connect the first with the subsequent process on which the defendant is arrested; where the *plaintiff relies on a new promise*, the *time* of the commencement of the suit is *matter of evidence*, and need not be pleaded.<sup>2</sup>

292. The common replication to a plea of the statute is, that the defendant did promise, or in the case of the plea of *actio non accrevit*, that the causes of action mentioned accrued within six years next before the commencement of the action. If the plaintiff rely upon fraud as an answer, it must be specially replied, and cannot be taken advantage of under the above replication.<sup>3</sup> If he would bring himself within the exception of accounts between merchants,<sup>4</sup> he must specially reply accordingly, and, if he omit so to do, he cannot avail himself of it on the trial.<sup>5</sup> The same as to the exception of being “imprisoned;” he must reply that he was imprisoned, and that, when he became and was at large from the

<sup>1</sup> *Soulden v. Van Rensselaer*, 8 Wend. (N. Y.) 472. A verdict establishes the truth of pleadings, and a verdict on the plea of the statute of limitations, in favor of one against another joint defendant, will be supported. *Ivey v. Gamble*, 7 Port. (Ala.) 465.

<sup>2</sup> *Livingston v. Ostrander*, 9 Wend. (N. Y.) 306.

<sup>3</sup> *Clark v. Hougham*, 8 Dow. & Ry. 322. And see *ante*, Ch. XVIII.

<sup>4</sup> See *ante*, Ch. XV.

<sup>5</sup> *Witherup v. Hill*, 9 Serg. & Rawle (Penn.), 11.



place mentioned of his imprisonment, the action was commenced within six years next after the time of his first becoming at large, and that he is ready to verify. When the action is brought during the continuance of the imprisonment, the replication then of course is accordingly, that, at the time when the said causes of action accrued, the plaintiff was and ever since has remained, and still is imprisoned, which he is ready to verify.<sup>1</sup> And the disabilities of infancy and coverture must be in like manner specially replied, with the averment that the plaintiff brought his action within six years next after the time when he became of full age, or of her becoming discovert, which he or she is ready to verify; and in case of continued infancy, the plaintiff was and still is, &c., which he is ready to verify. If the plaintiff be "beyond seas,"<sup>2</sup> then that the plaintiff says that at the time when the said causes of action in the declaration mentioned accrued, he was in parts beyond the seas, that is to say, at, &c., and that he afterwards on, &c.,<sup>3</sup> returned from the said parts, and which said return was his *first return* into this State after the accruing of the said causes of action, and that he commenced the action within six years next after his said *first return*, which he is ready to verify. In case of the absence of the defendant beyond seas, the replication then is, that the plaintiff says that the said defendant, before and at the time when the said causes of action accrued, was in parts beyond the seas, or out of the State,<sup>4</sup> that is to say, at, &c., and that he afterwards, to wit, on, &c.,<sup>5</sup> returned from the said parts into this State, which return was his *first return*, after the accruing of the said causes of action; and that the plaintiff says, that he commenced his action within six years next after the defendant's *first return*, after the accruing of the said causes of action, or any part thereof, concluding with a verification.<sup>6</sup> Whenever the replication relies

<sup>1</sup> *Piggett v. Rush*, 4 Adol. & Ell. 912. And see *ante*, Ch. XIX. § 192.

<sup>2</sup> See *ante*, Ch. XIX, §§ 200 and 201.

<sup>3</sup> The exact day, it is held, is not material.

<sup>4</sup> According to the words of the statute. See *ante*, §§ 205, 206, and 207.

<sup>5</sup> The exact day not material.

<sup>6</sup> That intestate was beyond seas till his death; that at the time of the accruing of the causes of action, in the said declaration mentioned, and of every part thereof, the said A, now deceased, was in parts beyond the seas, and there continued until the time of his decease; and that the said plaintiff, as administrator as aforesaid, within six years next after the decease of the said A, commenced this action against the said defendant, and this the said plaintiff, as administrator as aforesaid, is ready to verify. [A replication by an administrator that the plaintiff's intestate died in

on some special matter in answer, it concludes with a verification.<sup>1</sup>

293. The plea answering to *non assumpsit infra sex annos* in *assumpsit*, is, in debt upon simple contract, *nil debet, infra, &c.* If, to a declaration in debt on simple contract, the defendant plead *non assumpsit*, and a set-off against *the promises* mentioned in the declaration, the plaintiff may treat the pleas as a nullity, and enter the defendant's default.<sup>2</sup> The other plea of *non accrevit, &c.*, is as proper a plea of the statute to an action of debt upon simple contract as it is where the plaintiff declares in *assumpsit*, and may be pleaded to any form of action grounded upon simple contract.<sup>3</sup>

294. It was formerly doubted whether a defendant, in a *court of equity*, could, by demurrer, make the objection, that the remedy was barred by the statute of limitations, or whether he must not first resort to his plea. It is now, however, well settled, that, if it appear on the face of the bill that the suit is barred by the statute, and that if the case is within any of the exceptions of the statute, the fact must be stated in the complainant's bill. This has been so expressly held by Chancellor Walworth, in *Humbert v. Trinity Church*,<sup>4</sup> and in *Van Hook v. Whitlock*;<sup>5</sup> and is so laid down by the latest and most authoritative writers on equity jurisprudence.<sup>6</sup> If, therefore, upon the face of the bill, it appears that a debt accrued due more than six years before the commencement of the suit, a demurrer will lie.<sup>7</sup>

1828, that letters of administration were not taken out till 1844 (within six years of the time of bringing the action), and so the cause of action accrued within six years, was held bad. *Worden v. Worthington*, 2 Barb. (N. Y.) Sup. Ct. 368.]

<sup>1</sup> 6 Mod. 26; Holt, 427; 8 Mod. 318; Tidd, Prac. Ch. 29. [A rejoinder, by one of several defendants, to a replication averring a new promise by the defendants within six years, that he, the defendant, did not make a new promise, without denying that the other defendants did so, is bad on special demurrer. *Tracy v. Rathbone*, 8 Barb. (N. Y.) Sup. Ct. 543.]

<sup>2</sup> *Perry v. Fisher*, 6 East, 549; *Brennan v. Egan*, 4 Taunt. 164; *Van Vetcher v. Cowell*, 1 Hill (N. Y.), 203.

<sup>3</sup> Blanch. on Limitations, 149. See *ante*, §§ 76-79.

<sup>4</sup> *Humbert v. Trinity Church*, 7 Paige (N. Y.), Ch. 195.

<sup>5</sup> *Van Hook v. Whitlock*, *Ibid.* 378.

<sup>6</sup> Story, Equity Pleading, 378, 389, 390.

<sup>7</sup> *Ibid.* And see also *Hoare v. Peck*, 6 Simon, Ch. 51; *Cuthbert v. Cressy*, 4 Bligh (o. s.), 125; *Tyson v. Pole*, 3 Younge & Coll. 266; *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90; *Wisner v. Ogden*, 4 Wash. (Cir. Co.) 681; *Dunlap v. Gibbs*, 4 Yerg. (Tenn.) 94. [*Dickson v. Miller*, 11 S. & M. (Miss.) 594; *Muir v. Trustees, &c.*, 8

295. If the objection does not appear on the face of the bill, then a plea is proper; and it is now well established (though formerly it was otherwise), that the bar applies equally to the relief and the discovery. The objection may also be taken away by way of answer, and relied on as a defence.<sup>1</sup> In accordance with the rule of pleading above laid down, as established at law, where the demand is of any thing executory, as a promissory note payable at a distant period, the defendant by his plea must aver, that the cause of action has not accrued, and not that he did not promise within six years; for the reason that the statute bars only what was actually due six years before the suit was brought.<sup>2</sup>

296. If the bill should charge a fraud, and that the fraud was not discovered until within six years, the plea should not only set up the statute, but should contain averments, denying the fraud; or stating that the fraud, if any, was discovered within six years.<sup>3</sup> It should also be accompanied by an answer in support of the plea answering and denying the circumstances which go to avoid the bar.<sup>4</sup> Where a bill was brought by an administrator *de bonis non*, for an account of the intestate's estate after a lapse of from twenty to twenty-five years, and the defendant pleaded the statute, and filed a general answer to the whole bill, it was said by Mr. Justice Story to be "a dry naked plea of the statute of limitations, without any averments negating the special matters set up in the bill, which, if true, would avoid the operation of the statute;" and he held it to be clear, that "the plea should contain in itself such averments; and the answer in support thereof should also contain a full discovery of the matters so set up in avoidance of the bar." It is not sufficient for the answer alone to give such negative mat-

Barb. (N. Y.) Ch. 477; *Fellers v. Lee*, 3 Barb. (N. Y.) Sup. Ct. 488. But if the defendant relies upon lapse of time instead of a statutory limitation, he cannot demur, but must plead, as where more than twenty years have elapsed since the maturity of a mortgage debt. *Ibid.*]

<sup>1</sup> Story, Eq. Jurisp. §§ 55, 529; 2 *Ib.* § 1520; *Van Hook v. Whitlock*, 7 Paige (N. Y.), Ch. 378.

<sup>2</sup> Story, Eq. Plead. 582; Beames, Plead. in Eq. 165, 169, 170.

<sup>3</sup> *Brookshank v. Smith*, 2 Younge & Coll. 58 (V. Chan. Co.); *Clayton v. Winchelsea*, 8 *Ib.* 683; *Kane v. Bloodgood*, 7 Johns. Ch. 184; *Goodrich v. Pendleton*, 8 *Ib.* 884; 2 Story, Eq. Plead. 525.

<sup>4</sup> *Stearns v. Page*, 1 Story (Cir. Co.), 204. The same doctrine was affirmed by Lord Cottenham, in *Foley v. Hill*, 8 Myl. & Cr. 475. And see also "Pleadings in Equity, illustrative of Lord Redesdale's Treatise on the Pleadings in Suits in the Court of Chancery," p. 562, note *a*.

ters, for it is mere matter of discovery; but the plea should in itself, if true, contain a complete bar.<sup>1</sup>

297. It is upon the same ground that where a particular special promise within six years is charged in the bill to avoid the statute, the defendant must specially deny the promise, by averment in the plea, and must accompany it with an answer in support of the plea, containing a like denial of the promise, or other matter charged. He is not bound to answer to the original cause of action; for that may, consistently with the plea pleaded, be well admitted.<sup>2</sup>

<sup>1</sup> Story, Eq. Plead. 625, 688.

<sup>2</sup> Chapin v. Coleman, 11 Pick. (Mass.) 331. And see 2 Beames, Eq. Plead. 164, 170, 274.

## CHAPTER XXVII.

## TORTS.

298. It has before been shown that for torts *quasi ex contractu*, such as malfeasance, misfeasance, and nonfeasance, the action of assumpsit will lie;<sup>1</sup> and that the established rule in such cases is, that the statute begins to run from the breach of duty, and not from the damage thereby occasioned.<sup>2</sup> Cases admitting of some degree of doubt as to the exact time of the breach of duty were also cited.<sup>3</sup> To these may here be added the following: Where goods were attached by a deputy sheriff on mesne process, the officer was held not liable to the suit of the debtor while the lien created by the attachment continues, although he does not keep the property safely; and the statute of four years within which the debtor may bring a suit, in Maine, against the sheriff, for the neglect of the deputy, in suffering the goods to be destroyed, begins to run from the time the attachment is dissolved.<sup>4</sup>

299. But the action of assumpsit, as generally applied to cases of this kind, it was said by Chief Justice Dallas, in giving the judgment of the court in a case in the English Common Pleas, is of modern use; and in that case the court sustained an action on the case for consequential damages arising from a misfeasance as a tort unconnected with any contract. It was an action on the case against the proprietors of a stage-coach, to recover damages for an injury sustained by a passenger, in consequence of their coachman having upset the coach on which he was riding, the declaration alleging the breach of duty by the negligence of the defendant's servants; and the court held, it was not to be deemed founded on contract, or *quasi ex contractu*, nor was it necessary to prove any contract in order to sustain the action.<sup>5</sup>

<sup>1</sup> *Ante*, § 71.

<sup>2</sup> *Ante*, § 186.

<sup>3</sup> *Ante*, § 142.

<sup>4</sup> *Bailey v. Hall*, 4 Shep. (Me.) 408.

<sup>5</sup> *Brotherton v. Wood*, 8 Brod. & Bing. 4, and 54 Eng. Com. Law. In delivering the judgment of the court, Chief Justice Dallas said: "On the part of the plaintiffs in error, it was contended that the statement of the case in the declaration amounts

300. Actions upon the case for nuisances, such as the obstruction of ways and watercourses, and the diversion of the latter, must be brought some time within the time limited for the right of entry upon land, after such obstruction or diversion; and the right of action is not necessarily postponed until it can be shown that some actual damage has resulted therefrom to the plaintiff. That there exists a right in such cases, and that that right has been invaded, is sufficient; and if an action should be delayed until specific damage could be proved, the defendant, by a continued and uninterrupted adverse enjoyment, might set up a title in analogy to the time limited for the right of entry upon the land, which could not be successfully opposed. The law, therefore, implies damage in all such cases, before any actual damage has resulted.<sup>1</sup> Every continuance of that which was originally a nuisance the law considers a new nuisance, and, therefore, though the party complaining cannot, in an action on the case, recover upon the original cause of action, after the expiration of six years, he may for its continuance any time before the right of entry is barred

to a contract, and, that being so, all the rules which relate to actions founded on contracts must govern, and that it is a rule of law that such actions are joint, and must be maintained against all the defendants named in the declaration, or fail altogether. If it were true that the present action were founded on contract, so that, to support it, a contract between the parties to it must have been proved, the objection would deserve consideration. But we are of opinion that this action is not so founded, and that, on the trial, it could not have been necessary to show that there was any contract, and therefore the objection fails. The action is on the case against a common carrier, upon whom a duty is imposed by the custom of the realm, or, in other words, by the common law, to carry and convey their goods and passengers safely and securely, so that by their negligence or default no injury or damage happen. A breach of this duty is a breach of the law, and for this breach an action lies, founded on the common law, which action wants not the aid of a contract to support it." [But where the tort is the result of a breach of contract, the limitation which applies to the contract, and not the one which applies to the tort, controls. *Howard v. Ritchie*, 9 Kan. 102.]

<sup>1</sup> *Allen v. Ormond*, 8 East, 4; *Gardner v. Trustees of Newbury*, 2 Johns. (N. Y.) Ch. 162; *Bolivar Manufacturing Company v. Neponset Manufacturing Company*, 16 Pick. (Mass.) 241; *Crooker v. Bragg*, 10 Wend. (N. Y.) 260; *Pastorias v. Fisher*, 1 Rawle (Penn.), 27; *Angell on Watercourses*, 166 to 170. The rule is the same in respect to rights of common. If A, a commoner, infringe the rights of B, another commoner, as commoner, by surcharging, it is necessary that B should have A's right ascertained, otherwise the wrongful act of the latter would, in process of time, become evidence of an adverse right. *Hobson v. Todd*, 4 Term, 71; *Pindar v. Wadsworth*, 2 East, 158. [Where one, having a right to use land for a specific purpose, perverts it to other uses, the statute runs from the time of the perversion. *Rogers v. Stoevers*, 24 Penn. St. 186.]

as above mentioned,<sup>1</sup> and recover not only nominal damages, but such actual damage as has accrued any time within six years.

301. By the statute of James, actions on the case for torts other than *slander* must be brought within six years from the time when the cause of action accrued. But actions upon the case for words spoken must, by that statute, be commenced and sued within *two* years next after the words spoken. This, however, only extends to cases where the words are actionable in themselves, and not to cases where words, not actionable in themselves, become so by reason of some special damage arising from the speaking of them.<sup>2</sup> Thus slander of title is not within the limitation of two years, because it is not actionable unless special damage has accrued in consequence, as the slandering of title does not in itself import loss, but may occasion injury by preventing the selling or letting of the land.<sup>3</sup> Nor does it extend to actions for words founded upon an indictment, or other matter of record;<sup>4</sup> nor to actions for libel.<sup>5</sup> Cases where words are not actionable in themselves, but become so in consequence of the uttering of them, come under the head of actions on the case, and must, therefore, be sued within six years from the time when the cause of action is proved to have accrued, which is the special damage.

302. The sixth section of the statute of James provides, that “in all actions upon the case for slanderous words, if the jury, upon the trial of the issue upon such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs, in such action, shall have and recover so much costs as the damages so given or assessed amount unto, without any further increase of the same. In those cases, therefore, where the jury assess damages under forty shillings, and where, in consequence of the statute, the plaintiff recovers no greater costs than damages, the time of limitation is two years; for the words must have been actionable in themselves. But where full costs are allowed, although the damages be under forty shillings, the action is not within the limitation of two years, for in this case the slanderous words could not have been action-

<sup>1</sup> 8 Black. Com. 219; Com. Dig. T. Act. on the case for Nuisance; *Staples v. Spring*, 10 Mass. 72; *Baldwin v. Calkins*, 10 Wend. (N. Y.) 167; *Bridleman v. Foulke*, 5 Watts (Penn.), 808. [*Delaware, &c., v. Lee*, 2 N. J. 248.]

<sup>2</sup> *Brown v. Gibbens*, Salk. 206.

<sup>3</sup> *Law v. Harwood*, Cro. Car. 140.

<sup>4</sup> 1 Sid. 95; *Blanch on Lim.* 99.

<sup>5</sup> *Arch. Plead.* 29; *Blanch, supra*.



able within the meaning of the act, but became actionable only by reason of the special damage, which, being the gist of the action, the limitation is six years, which begins to run from the time that the consequential damage accrued.<sup>1</sup>

303. In actions for slander, if no notice be given of a defence under the statute, the plaintiff may give in evidence words spoken more than two years before the commencement of the action.<sup>2</sup> But where the declaration alleged the words to have been spoken on a particular day within two years, and the plaintiff produced evidence of words spoken more than two years before the commencement of the action, the defendant was allowed, without terms, to file the plea of the statute.<sup>3</sup>

304. By the statute of James, it is required that the action *sur trover* shall be commenced and sued within the time and limitation after mentioned. But from the omission of trover in the perclose, it has been contended that trover was not within the statute. But in the case in which this objection was taken, the whole court conceived, that although actions of trover are not mentioned in the perclose, yet the words being, that "actions upon the case shall be brought within six years," the action of trover is implied in those general words.<sup>4</sup> The action of trover must, therefore, be brought within six years after the cause of action accrued; and the time when the cause of action is considered to have accrued, in an action of trover, is the time of the *conversion*. For any man may take the goods of another into possession, if he finds them; but no finder is allowed to acquire a property in them, unless the owner be for ever unknown. The finder, therefore, must not convert them to his own use, which he is presumed to do, if he refuses to deliver them to the owner. And such refusal is *prima facie* sufficient evidence of a conversion.<sup>5</sup> Thus, in a case where an executor, several years before, had left some household goods in the house, by the consent of the heir, who afterwards used them; and within

<sup>1</sup> Blanch on Lim. 100. The statute of Mississippi, which declares that every action on the case for *words spoken* shall be commenced and sued within one year next after the words spoken, and not after, embraces words *written* as well as spoken. *Menter v. Stewart*, 2 How. (Miss.) 698. [*Contra*, in Illinois, *Hasell v. Shelby*, 11 Ill. 9.]

<sup>2</sup> *Brickell v. Davis*, 21 Pick. (Mass.) 404.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Swayn v. Stephens*, Cro. Car. 245.

<sup>5</sup> 3 Black. Comm. 158. See *ante*, the subject of conversion treated of in Ch. XVII. on Agency and Factorage.

six years of the action brought, the executor demanded the goods, and the heir refused to let him have them, whereupon trover was brought, and the statute of limitations pleaded. It was held by the court, that the use *before* the demand was neither a conversion, nor any evidence of it, for it was with the consent of the executor until that time. And the demand being within six years, the refusal which ensued it, and which was the only evidence of a conversion in the case, was within the six years. The court also said, that if a trover be before the six years, and a conversion after, the statute cannot be pleaded.<sup>1</sup> The redemption of a pawn is not affected by the statute of limitations, and runs only from the conversion of the thing pawned.<sup>2</sup> But where goods are *tortiously*

<sup>1</sup> *Montague v. Sandwich*, 7 Mod. 99, and *vide Compton v. Chandless*, 4 Esp. 20, and *Horsefield v. Cost*, Addis. 153; *Fishwick v. Sewall*, 4 Har. & Johns. (Md.) 393. [When the sole property of a wife is allowed by her trustee to remain in the possession of her husband, who disposes of it by will, the general character of which is known to the trustee, the statute begins to run against the trustee from the possession of the property by the executor under the will. *Bryan v. Weems*, 29 Ala. 428. A pure parol loan of a slave, though for life, is so changed in character by the subsequent coverture of the borrower that the notorious possession of the husband is adverse to the lender. *Hallam v. Bowrie*, 1 Sneed (Tenn.), 860. But the intention of the possessor to claim adversely, and the knowledge of that intention on the part of the owner, must coincide in order to give title to personal property by adverse possession. *Lawson v. Cunningham*, 21 Ga. 454.]

<sup>2</sup> *Slaymaker v. Wilson*, 1 Penn. 216. And see *Callis v. Tolson*, 6 Gill & Johns. (Md.) 81. [If the tenant erects buildings on leased land, and permits them to remain in the possession of the owner of the freehold more than six years after the expiration of his term, the statute of limitations bars all claim to their recovery. *Preston v. Briggs*, 16 Vt. 124. So adverse possession of personal property gives title, upon which the possessor may bring an action against the former owner. *Cockfield v. Hudson*, 1 Brev. (S. C.) 311; *Winburn v. Cochran*, 9 Texas, 123; 9 Ib. 148; *Bohannon v. Chapman*, 17 Ala. 696; *Howell v. Hair*, 15 Ib. 194; *Vandever v. Vandever*, 8 Met. (Ky.) 137; *Devine v. Bullock*, Ib. 418; *Clarke v. Slaughter*, 34 Miss. (5 George) 65; *Ewell v. Tedwell*, 20 Ark. 136; *McArthur v. Carvie*, 82 Ala. 75; *Mercein v. Burton*, 17 Texas, 206. And the rule that obtains in relation to real estate holds good here, viz., that, where one has held by the consent of the true owner as bailee or otherwise, there can be no adverse possession until there is a denial of the latter's rights. *Lucas v. Daniels*, 34 Ala. 188; *Hall v. Dickey*, 32 Miss. (3 George) 208. There must be some positive action in relation to the property, indicating an adverse claim. *Baker v. Chase*, 55 N. H. 61. The presumption is that the possessor is also the owner, and it is for the true owner to allege and prove that such is not the fact. *Smith v. Reid*, 6 Jones, Law (N. C.), 494. But, in an action of trover, the possession of one who claimed adversely to the true owner, and sold to the defendant, cannot be linked with the possession of the defendant so as to make up the time of the statutory limitation. *Beadle v. Hunter*, 3 Strobl. (S. C.) 81; *Moffatt v. Buchanan*, 11 Humph. (Tenn.) 869. [Wells v. Ragland, 1 Swan (Tenn.), 501; *Hobbs v. Ballard*, 5 Sneed (Tenn.), 395. A mere life-estate in a chattel cannot be created by the operation of

taken, the statute will run from the taking, for that, in such a case, is the time of the conversion. Thus, where goods were taken on an execution, which was afterwards set aside for *irregularity*, an action of trover was brought, and the defendant pleaded the statute of limitations; it was held, that the execution being irregular, was a nullity, and that the time when the statute began to operate was from the first taking of the goods, and not from the time when the execution was set aside.<sup>1</sup> So an unlawful disposition of property, rightfully in possession, being a conversion, the statute will run from such unlawful act.<sup>2</sup> And the statute is also a bar to an action of trover commenced more than six years after the conversion, although the plaintiff did not know of the conversion, until within that period; the defendant not having practised any fraud, in order to prevent the plaintiff from obtaining that knowledge at an earlier period.<sup>3</sup>

the statute of limitations against the acknowledged owner of the reversion from whom the possession was obtained. *Turner v. Turner*, 2 Sneed (Tenn.), 27. But see *Burns v. Ray*, 18 B. Mon. (Ky.) 892; *Crabtree v. McDaniel*, 17 Ark. 222; and *post*, § 370. The distinction between the operation of the statute of limitations when applied to property adversely held, and as applied to contracts for the payment of money, is this; in the one case it acts on the title, and, when the bar is perfect, transfers it to the adverse possessor, whilst in the other there is no such thing as an adverse possession, but the statute simply affects the remedy and not the debt. *Jones v. Jones*, 18 Ala. 248. Where personal property is converted, suits for the property itself, or for damages for its conversion, will be barred in three years, while a suit for the value will not be barred till the expiration of six years. *Kirkman v. Phillips*, 7 Heisk. (Tenn.) 222.]

<sup>1</sup> *Read v. Markle*, 3 Johns. 516, and *vide* *Badlam v. Tucker*, 1 Pick. (Mass.) 397. [*Kelsey v. Griswold*, 6 Barb. (N. Y.) Sup. Ct. 486; *Thomas v. Green*, 6 Texas, 372; *Same v. Brook*, *Ib.* 359.]

<sup>2</sup> *Dench v. Walker*, 14 Mass. 499; *Melville v. Brown*, 15 Mass. 82. [Upon the sale of a slave by one who has only a life-estate in him, a right of action accrues to the remainder-man. *Coffee v. Wilkinson*, 1 Met. (Ky.) 101. Where the defendant, in a replevin suit, pays the damages assessed against him, and the slave, the subject of the replevin suit, after the wrongful taking and during the pendency of the suit, is delivered of a child, the right of action for the child accrues at its birth. *Houston v. Bibb*, 5 Jones, Law (N. C.), 88.]

<sup>3</sup> *Granger v. George*, 5 Barn. & Cress. 149, and *vide* *Short v. M'Carthy*, 3 Barn. & Ald. 626, and *Brown v. Howard*, 2 B. & Bing. 78. [*Johnson v. White*, 18 S. & M. (Miss.) 584; *Ward v. Dulaney*, 28 Miss. (1 Cush.) 410; *Jordan v. Thornton*, 7 Ga. 517; *Smith v. Newby*, 18 Miss. 159; *Clark v. Marriott*, 9 Gill, 381. In an action of trover, an allegation of fraud in the conversion, fraudulently concealed by the defendant, and undiscovered by the plaintiff until a time within four years before the commencement of the suit, is not, in South Carolina, a good replication to a plea of the statute of limitations. *Clarke v. Reeder*, 1 Speers (S. C.), 398; *Simons v. Fox*, 12 Rich. Law (S. C.), 392; *Fears v. Sykes*, 35 Miss. (6 George) 638.]

305. Actions of *replevin* must be commenced and sued within the time prescribed by the statute, after the cause of action accrued, that is, after the unlawful possession of the goods. But the owner of goods is not barred by the statute of limitations, where they are held by another person, with the owner's permission.<sup>1</sup> Where property replevied was loaned to the defendant by the plaintiff, and held and used by him under and in virtue of such loan for more than the time limited before suit brought, such possession did not sustain the plea of the statute in an action of replevin; the plaintiff having no knowledge of any adverse claim of the defendant.<sup>2</sup>

306. The action of *detinue*, which lies against a man for the detention of goods that came to his possession by delivery or finding,<sup>3</sup> and which, by the statute of James, must be brought within six years, though in some cases a proper remedy has fallen nearly into desuetude, on account of the wager of law, which, in this form of action, the defendant is allowed to avail himself of.<sup>4</sup> The old writ of *de rationabili parte bonorum*, although concluding in the *detinet*, has been decided not to be within the statute of James, on the ground that it is an original writ in the register, and different from the common action of detinue.<sup>5</sup>

307. The statute may be pleaded to trespass *quare clausum fregit*

<sup>1</sup> *Ward v. Reeder*, 2 Har. & M'Hen. 145.

<sup>2</sup> *Callis v. Tolson*, 6 Gill & Johns. (Md.) 81. [But if the property is sold upon an agreement to pay the price in instalments, the property to remain the vendor's till paid for, the vendee, after six years' possession from the time when the last instalment was due, may plead the statute. *Barton v. Dickens*, 48 Penn. St. 515.]

<sup>3</sup> 8 Black. Comm. 152.

<sup>4</sup> Sel. N. P. 667; and see *ante*, Ch. II. § 19. [In detinue for title-deeds, the statute does not begin to run until the title to the property has been adjudged to belong to the real owner, as until then the possession is not to be deemed as adverse to such owner. *Plant v. Cotterill*, 5 Hurl. & Nor. 480. Where goods have been bailed for safe custody, and the bailee wrongfully sells them, and the owner, not knowing of the sale for more than six years thereafter, makes demand for the goods and is refused, an action of detinue will lie. The statute runs from the date of the demand and refusal, and not from the sale, since the plaintiffs, in such a case, though entitled, if they had discovered the sale, to sue immediately for the conversion, were also entitled to elect to sue, upon the breach of the bailee's duty, by the refusal to deliver on demand. It seems that, where the action of detinue is founded upon the bare taking and withholding the property of another without any circumstances to show a trust, or upon which to found an action to sue either for the wrong or for a breach of the contract, the statute will run from the wrongful act. *Wilkinson v. Verity*, L. R. 6 C. P. 206.]

<sup>5</sup> Arch. Plead. 29.

for *mesne* profits, and the defendant may, in this manner, protect himself from all but within the time limited for the commencement of the action.<sup>1</sup> By the statute of James, trespass *quare clausum*, &c., must be brought within *six* years, and trespass to persons within *four* years of the trespass committed. But when the trespass to the person has been continued many years (as in the case of false imprisonment), and the statute is pleaded, the jury give damages only for the time within the statute.<sup>2</sup>

308. Actions for criminal conversation, &c., and beating or imprisoning wives or servants, *per quod consortium, vel servitium, amiserunt*, though they are within the statute of James, yet it has been a question, whether the limitation be six or four years. In an action by the husband for criminal conversation with his wife, the defendant pleaded not guilty within six years, to which there was a demurrer. The question was, whether the action was *trespass* and *assault*, or *case*. If the former, the plea was bad, because it ought to have been brought within *four* years; if the latter, it was good. The court held it to be an action on the case.<sup>3</sup> And in another case of the same description, the court seemed to have considered the action as an action on the case; but decided that, had the action been in form trespass, still a plea of "not guilty *infra sex annos*," not having been specially demurred to, would be good on general demurrer; and it was said by the court, if the defendant take the longer period, and plead "not guilty within six years," and the plea be not specially demurred to, it will be good either way of considering it, for the greater period includes the less.<sup>4</sup> A learned writer has considered actions for criminal conversation, &c., as actions upon the case in principle, though he has classed them under the head of actions of trespass. His reasons are, *first*, that the wrongs complained therein are not direct, but consequential; *secondly*, that the plaintiff may declare for

<sup>1</sup> Runnington on Ejectment, 444. [Hill v. Myers, 46 Penn. St. 15.]

<sup>2</sup> 3 Mod. 111. See *ante*, § 198.

<sup>3</sup> Cook v. Sayer, 2 Wils. 85.

<sup>4</sup> Macfadzen v. Olivant, 6 East, 888. In New Hampshire, in an action for criminal conversation with the plaintiff's wife, the declaration was in the common form, and the question was, whether the action was trespass, which is barred by the statute of that State, if not commenced within three years next after the cause of action, or case, the limitation to which is six years. The court were of opinion that the action was, in effect, an action on the case, and that the plea that the defendant is not guilty within three years before the commencement of the action was not a good bar. Sandborn v. Neilson, 5 N. H. 814.

them by bill with a *quod cum*, which is not allowed in trespass; *thirdly*, that, in these actions, the plea of the *statute of limitations* is "not guilty within *six* years," and not, as in trespass and assault, "within *four* years;" and *lastly*, that, although the plaintiff should not recover *forty shillings damages*, he is, nevertheless, entitled to full *costs*.<sup>1</sup> It will be found, says one of the learned editors of Starkie on Evidence, upon examination of the American cases on this subject, that no settled form of action is adopted, but that case and trespass are brought indifferently.<sup>2</sup>

309. As in pleading the statute in actions upon contract, the better mode of pleading is *actio non accrevit infra sex annos*, for the reason that the plea of *non assumpsit*, &c., may be insufficient, as the promise may have preceded the cause of action;<sup>3</sup> so is the first-mentioned plea to be preferred to the plea of "not guilty" within six years, in actions upon tort, as the action may be for the consequences of the act originating the tort. Thus, to a declaration in an action on the case founded in tort, a plea of not guilty of the supposed grievances in the declaration mentioned, within six years before the action, was held bad on special demurrer.<sup>4</sup> Where the plaintiff complained, in a plea of trespass, for that the defendant, with force of arms, assaulted and seduced the plaintiff's wife, whereby he lost the comfort of her society, &c., against the peace, &c., to his damage, &c.; whether this be trespass or case, the plea of not guilty, *infra sex annos*, is at any rate good on general demurrer.<sup>5</sup> Where words are actionable in themselves, the time is reckoned from the speaking of the words; but where the special damage is the gist of the action, it is not sufficient for the defendant to aver in his plea, that he did not speak the words within six years, because, though that was the fact, the special damage which is the cause of action may have arisen within six years. It is therefore requisite that he should plead, that the cause of action did not accrue within that limitation.<sup>6</sup>

<sup>1</sup> Tidd's Practice, 5.

<sup>2</sup> Metcalf's ed. of Starkie on Evidence, vol. iii. p. 1808, n. 1. When a daughter is seduced, the cause of action accrues, not at the time of the seduction, but when the loss occurs. *Hancock v. Wilhoite*, 1 Duval (Ky.), 818.

<sup>3</sup> See preceding chapter.

<sup>4</sup> *Dyster v. Battye*, 3 Barn. & Ald. 448. In an action on the case against an officer for not returning on execution, plea of "not guilty within," &c., instead of *actio non accrevit*, &c., bad; *semble*, *Fisher v. Pond*, 1 Hill (N. Y.), 672.

<sup>5</sup> *Macfadden v. Olivant*, 6 East, 387.

<sup>6</sup> 1 Starkie on Slander, 478, 474.

310. The plea of *non cepit infra sex annos*, in *replevin*, will not answer the detainer, and cannot be pleaded.<sup>1</sup> And where the defendant pleaded not guilty, *de captione prædicta infra sex annos jam ultimo elapsos*, though it was urged, that this was the same as pleading *non cepit*, that, if he did not take, he could not be guilty of the detainer; and that, if this way of pleading was not allowed, the statute would, as to this action, be entirely evaded: yet the plea was held ill; for it was said, he ought to have answered to the detainer, as well as to the taking; that there might be a detainer without a taking; and that a thing might be lawfully distrained, although unlawfully kept.<sup>2</sup> But these objections would not apply to the plea of *actio non accrevit*, &c.

<sup>1</sup> Com. Dig. Plead. 1 Har. & McHen. (Md.) 145.

<sup>2</sup> Bacon, Abr. Lim. of Act.



## CHAPTER XXVIII.

## JUDICIAL PROCESS.

311. ALL that is positively enacted in statutes of limitation generally is, that the actions therein mentioned shall be commenced and sued within the time limited. "What act of the party commences the suit" is, therefore, a matter of judicial construction and decision entirely.<sup>1</sup> Formerly, in England, by the general rule in the Court of King's Bench, the *Bill of Middlesex*, or *latitat*, was a process sufficient to avoid the statute. The statute, it was considered, did not intend to bar, unless the party had *forborne* during the time limited; and that if he sued out a *latitat* within the time for obtaining custody of the defendant, in order that he may declare against him, there is no forbearance on the part of the plaintiff, though, artificially, the bill upon the record is the first step.<sup>2</sup> As a *latitat* was sufficient to suspend the statute in the King's Bench, so a *capias* was sufficient in the common pleas without suing out an original.<sup>3</sup>

<sup>1</sup> The act of limitation of 32 Hen. VII. computes the prescription from the time run before the teste of the writs therein mentioned. But because that would not be a true criterion of the time of commencing suits, within the provisions of the statute of James, the legislature has in the latter purposely avoided mentioning the teste of writs, the exhibiting of bills, summoning, serving, &c., but leaves to every court to say "what act of the party commences the suit." Per Lord Mansfield, *Henderson v. Whitaker*, 2 Burr. 950.

<sup>2</sup> *Foster v. Bonner*, Cowper, 454; Sid. 52; Carth. 232; 8 Mod. 109.

<sup>3</sup> *Haven v. James*, Willes, 258; 15 Vin. Abr. 103. By the statute 1 & 2 Vict. § 2, all personal actions must now be commenced by writ of summons. The writ is now the commencement of the action, and, as the record mentions the time when the first writ was issued, it seems to be now unnecessary to reply that a writ has been sued out within time, or to produce the writ in evidence. If, however, the plaint were levied in the first instance in an inferior court in proper time, and subsequently removed to the superior court, and to the declaration in the superior court the defendant plead the statute (as the uniformity process act does not in such case apply), the plaintiff should reply and show the proceedings in the inferior court, and the statute will be barred. To save the statute of limitations by issuing a writ, the plaintiff must, since the statute 2 Will. IV., c. 39, § 10, either arrest or serve the defendant, as the case may be, or proceed to or towards outlawry upon the writ, or get it properly returned and entered of record, and continued by other writs; also properly returned,

312. The general rule appears to be, in this country, that, at the time of suing out of the writ, the action commences;<sup>1</sup> and either, when the writ is delivered to the sheriff, or to his deputy; or when it is sent to either of them with a *bona fide* intention to be served upon the defendant, it is considered to have issued.<sup>2</sup> It has been asserted by high authority, that the reporter of this case erred in his marginal note, in supposing that the court meant to decide, that it was not necessary to prove that the writ actually reached the hands of the sheriff.<sup>3</sup> By the same authority, the decision in the case of *Beekman v. Satterlee*,<sup>4</sup> in New York, which went to the length, that the delivery of a writ to the sheriff and obtaining his return thereon, was sufficient to save the statute, though the sheriff had received instructions not to serve it, was questioned;<sup>5</sup> and it was said, that, notwithstanding that decision, it could not be thought that the sheriff was authorized, under his oath of office, to make a false return upon the writ, by stating that the defendant could not be found in his bailiwick, when in truth the only reason why the defendant was not arrested was because the sheriff had been instructed by the plaintiff not to execute the process of the court. The suing out of the writ, he said, was undoubtedly the commencement of the suit; but the writ is not considered as legally sued out until it is delivered to the sheriff, with authority to him to serve it on the defendant, if he

and entered of record, as that statute (sect. 10) provides that no writ shall be available to save the statute, unless that be done. Resealing a writ to save the statute is not a reissuing. *Browne on Actions at Law*, 61; and vol. 45, Law Lib. 51.

<sup>1</sup> *Lowry v. Lawrence*, 1 Caines, 79; *Cheetham v. Lewis*, 8 Johns. 42; *Fowler v. Sharp*, 15 Ib. 823; *Badger v. Phinney*, 15 Mass. 859; *Harris v. Dennis*, 1 Serg. & Rawle, 286; *Carpenter v. Butterfield*, 8 Johns. Ch. 145. [*Hail v. Spencer*, 1 Angell (R. I.), 17; *Kenney v. Lee*, 10 Texas, 155. The action commences by filing the complaint without the issuance of summons thereon. *Sharp v. McGuire*, 19 Cal. 577; *Pemental v. San Francisco*, 21 Ib. 351. Information filed and the arrest and recognition of the offender is a commencement of a prosecution. *State v. Groome*, 10 Iowa (2 With.), 308. The process regularly delivered to the officer for service is the commencement of suit. *Evans v. Galloway*, 20 Ind. 479. If the defendant dies after suit brought, and after the expiration of two years, the time within which after giving bonds an administrator cannot be sued, the administrator is summoned in to defend, he cannot plead the statute of limitations, as the coming in of the administrator to defend is not the commencement of the suit. 13 Allen (Mass.), 221.]

<sup>2</sup> *Burdick v. Green*, 18 Johns. (N. Y.) 14. [*Davis v. Duffie*, 8 Bosw. (N. Y.) 617.]

<sup>3</sup> Per Chancellor Walworth, in *Jackson v. Brooks*, in error, 14 Wend. (N. Y.) 649.

<sup>4</sup> *Beekman v. Satterlee*, 5 Cow. (N. Y.) 519.

<sup>5</sup> *Jackson v. Brooks*, *supra*.

can be found within his bailiwick, or is placed in his office, or transmitted to him for the purpose of being sued. It was not absolutely necessary, however, said Chancellor Walworth, that the writ should have actually reached the hands of the sheriff, so that the defendant could have been arrested thereon before the expiration of the time limited by the statute for the commencement of the action. And such he took to be the decision in *Ross v. Luther*,<sup>1</sup> and in *Burdick v. Green*.<sup>2</sup>

313. But it has been held that if the plaintiff would avoid the bar of the statute by having seasonably sued out process, which failed of service through inevitable accident in the transportation by mail, it is incumbent on him to show, that he previously ascertained the course of the mail, and that a letter enclosing the precept, and properly directed, was put into the post-office sufficiently early to have reached the officer, by the ordinary route, in season for legal service. The court, in this case, said that, if from any consideration, the plaintiff saw fit to send his writ for service even to a remote town in the county, he had a right so to do, and was not to be prejudiced thereby, provided he sent it in such season as that by due and usual course of mail to such town, the precept would reach the officer sufficiently early for legal service. This, the court held, he must show as a necessary link in the chain of evidence; for, if the letter was not seasonably put into the office, then its non-arrival cannot, by the party sending it, be attributed to inevitable accident.<sup>3</sup>

<sup>1</sup> *Ross v. Luther*, 4 Cow. (N. Y.) 158.

<sup>2</sup> *Burdick v. Green*, *supra*, § 812. [Delivering a claim to a justice of the peace, with directions to issue a summons, is not a commencement of the suit. *Price v. Luter*, 14 Texas, 6. The issuing of a new summons, after an insufficient service of a former one, is not the commencement of a new action, but the continuance of the old. *Isaacs v. Price*, 2 Dill C. Ct. (U. S.) 847.]

<sup>3</sup> *Jewett v. Greene*, 8 Greenl. (Me.) 447. It was held, in Vermont, that the taking out of the writ is the commencement of the process, to avoid the statute, if it be served in time for the next court to which it is returnable. *Allen v. Mann*, 1 Chip. (Vt.) 94. [So is the issuing of a summons and order of notice upon a petition. *Blain v. Blain*, 45 Vt. 588.] The Revised Statutes of Massachusetts provide, that if any action duly commenced within the time shall fail of a sufficient service or return, by unavoidable accident, or default or neglect of the officer, the plaintiff may commence a new action within one year. (See Appendix, p. li.) [And where, on the 31st of August, 1844, A. sued out a writ against D., on a note dated September 15, 1838, payable on demand, and described D., in the writ, as of P., in the county of B., where he formerly resided, though he had removed to M., in the county of P., about two years before, without A.'s knowledge; and the writ was delivered to an officer in the county of B.,

• 314. A *capias* issuing to the sheriff of a county different from that in which the defendant resides is, it has been held, a good commencement of a suit to save the statute.<sup>1</sup> Chancellor Walworth, in giving his opinion to this effect, relied upon *Bremion v. Evelyn*,<sup>2</sup> and *Hall v. Wybourn*,<sup>3</sup> in which cases it seems to have been conceded by the court that a plaintiff might file an *original*, or sue out a *latitat*, for the mere purpose of saving the statute, although the defendant was out of the realm, so that the process could not be made effectual against him, except by a continuance thereof after his return. Such, says the Chancellor, appears to have been the practice both in this country and in England, previous to the Revolution, and in New York, down to the time of the operation of the Revised Statutes of that State. The plaintiff having complied with all the necessary forms to continue the process, with a view to declare against the defendant, upon the promises laid in the declaration, at a subsequent time, when the defendant should have actually appeared in the suit thus formally commenced, the Chancellor thought it was competent for the defendant to tender an issue of fact upon the question whether the plaintiff intended to have the writ served, when he did no act, and gave no instructions to prevent the sheriff from serving the same, if the defendant had been found in his bailiwick at any time before the return day of the *capias* sued out.

315. Though the issuing of the writ is regarded as a sufficient commencement of the action, yet the *date* of it is not conclusive

near the last day of service, who made return thereon that he could not find D. in his precinct; and, on the 31st of December, 1844, A. sued out another writ against D., on the same note, and caused it to be served and entered in court, — held, under the foregoing provision, that the first action was duly commenced, and that it failed of a sufficient service by an unavoidable accident, and that the second action was saved from the operation of the statute of limitations. *Bullock v. Dean*, 12 Met. (Mass.) 15. In North Carolina the new writ must be returnable at the next term of court. *Fullbought v. Tritt*, 2 Dev. & Bat. 491; *Hanna v. Ingram*, 8 Jones (Law), 55.] And in Maine, in such case, within six months, in respect to a real or mixed action. (Appendix, p. xxxviii.) In Vermont, within one year, in any action. (Appendix, p. xlii.) In New York, it shall be competent for the defendant to prove on the trial, that the process instituted by the plaintiff was not issued with the intent required by law, &c. (Appendix, p. lxiv.) [In Arkansas, the issuance of the writ is the commencement of the action. *State Bank v. Cason*, 5 Eng. (Ark.) 479. In Connecticut, the service. *Sandford v. Dick*, 17 Conn. 213.]

<sup>1</sup> *Jackson v. Brooks*, 14 Wend. (N. Y.) 649, in the Court of Errors, *fourteen* of the judges (with Walworth, Chancellor) to *twelve*.

<sup>2</sup> 1 Levinz, 111.

<sup>3</sup> Carth. 136.

as to the time when it was *taken out*; and Lord Mansfield said, in *Henderson v. Baker*,<sup>1</sup> that the courts had uniformly held for one hundred and fifty years, that where it became material to distinguish, they would consider the day when the writ was taken out as the *substance*, and the *teste* the *form*;<sup>2</sup> and it would, he said, “be most extraordinary and unequitable,” not to allow the presumption that the plaintiff commenced his process seasonably, “to be rebutted by the defendant, by showing, that in *real truth* the time was run before the plaintiff took any step.”<sup>3</sup> All writs in England are supposed by fiction in law to issue in term; but where it is necessary, with a view to the statute of limitations, that the exact time should appear, the parties may show, that, in fact, the writ issued in vacation.<sup>4</sup> In *Ford v. Phillips*, in Massachusetts,<sup>5</sup> the court speak of a fact which took place “*after* the action was commenced, and before the writ *was served*.”<sup>6</sup> “It has certainly,” says Putnam, J., in giving the court’s opinion in *Gardner v. Webber*<sup>7</sup> (in which the question was, whether the date or the service of the writ is the commencement of the action), “been understood in Massachusetts, that the day of the date was the commencement of the action.” But, he added: “It is *prima facie* evidence only, and admits of evidence to rebut the presump-

<sup>1</sup> *Henderson v. Baker*, 2 Burr. 950.

<sup>2</sup> Chief Justice Kelynge is reported to have said that the time when a *latitat* is sued forth is traversable, and may be averred otherwise than according to the *teste*; which was agreed by the whole court; for a relation shall not work a wrong. If a man be taken in the vacation by a warrant without writ, and a *latitat* be procured, tested in the preceding term, it shall not discharge the wrong done after the *teste*, and before the actual taking out of the writ; but the plaintiff may take issue, when it was prosecuted in truth. 2 Keb. 198. Where the arrest is before the actual suing out of the writ, it has been often determined that it cannot be justified; and that the day when it issued may be averred, notwithstanding the *teste* is before the arrest. T. Raym. 161; *Henway v. Merrey*, 1 Vent. 28; *Chauncey v. Rutter*, 8 Keb. 213.

<sup>3</sup> It is not sufficient that the writ bears *teste* before the expiration of the six years; it must be *bona fide* taken out; and the time may be averred and shown, notwithstanding the *teste*. 6 Com. Dig. 589.

<sup>4</sup> *Lester v. Jenkins*, 8 Barn. & Cress. 389; *Morris v. Pugh*, 8 Burr. 1241. See also authorities to Cowen & Hill’s notes to Phillips on Evidence, Part II. p. 1077. As between parties and privies, the exact hour when an execution issued may be shown by parol, notwithstanding its date, for the purpose of establishing that it issued too soon. *Allen v. Portland Stage Company*, 8 Greenl. (Me.) 207.

<sup>5</sup> *Ford v. Phillips*, 1 Pick. (Mass.) 202.

<sup>6</sup> See also *Badger v. Phinney*, 15 Mass. 364.

<sup>7</sup> *Gardner v. Webber*, 17 Pick. (Mass.) 407.

tion arising from the date; but, until rebutted, the presumption is to prevail, that the true date appears; and that date is the commencement of the suit." That the date is not conclusive, has also been held in Maine,<sup>1</sup> and in New Hampshire.<sup>2</sup>

316. The filing of a claim in set-off by a defendant, it was held in Massachusetts, is equivalent to the commencement of an action thereon so far as regards the statute; and, if the plaintiff discontinues his action, the defendant may prevent his claim from being barred by the statute, by commencing an action thereon within three months afterwards, agreeably to the statute of 1793, although the time of limitation has expired.<sup>3</sup>

317. If a writ issue against two, and be served upon one only, and an alias writ subsequently issue, which is served upon both, this is for all purposes a new action, and not a continuance of the first, so as to avoid the operation of the statute.<sup>4</sup> Where a writ was issued against A, within six years from the time of the cause of action accrued, and the plaintiff's attorney, finding that the demand was on a partnership account against A and B, filed his declaration against A and B, as of the day of the term on which the writ was returnable, which was after six years had elapsed, and A pleaded the statute, it was held to be the commencement of a suit within six years. But this was because the variance between the writ and the declaration was not taken advantage of in proper time. The writ, the court said, issued within six years, and the declaration was to be considered as a continuation of the same writ, so that the statute was no bar.<sup>5</sup>

<sup>1</sup> *Johnson v. Farwell*, 7 Greenl. (Me.) 370.

<sup>2</sup> *Society for Prop. the Gospel, &c. v. Whitcomb*, 2 N. H. 227.

<sup>3</sup> *Hunt v. Spalding*, 18 Pick. 521. In Maryland, it has been held that the docketing of an action, with directions to the clerk to issue the necessary process, will arrest the currency of the statute, whether such process is issued or not. *Bank of United States v. Lyle*, 10 Gill & Johns. (Md.) 826.

<sup>4</sup> *Magaw v. Clark*, 6 Watts (Penn.), 528. [A brought suit before a justice of the peace on a joint debt against B & C. B was served with process, appeared, and judgment was given against him. *Nulla bona* being returned on execution, A sued C on the same debt before another justice. Held, no continuance of the first action. *Wann v. Pattengale*, 14 Penn. St. (2 Harris) 818. But, in New York, a joint debtor prosecuted upon a judgment, obtained without notice to him, cannot plead the statute. Under the practice of that State, a judgment binds joint defendants not served with process. *White v. Ward*, 35 Barb. (N. Y.) 687.]

<sup>5</sup> *Garland v. Chattel*, 12 Johns. (N. Y.) 480. [And see also, to same effect, *Woodward v. Ware*, 87 Me. (2 Heath) 568; *Hemphill v. McClimans*, 24 Penn. St.



818. In England, the *latitat* and *clausum fregit* are both writs of *trespass*, and by the practice (at least formerly) of the King's Bench and Common Pleas, the plaintiff may ground upon them a declaration in *any* personal action. This accounts for the rule, that when the action is commenced, *it must be duly continued*, in order to avoid the statute. That is, if the writ is returned *non est inventus*, the writ and the return must be entered in the office, as of the term the writ is returnable, so that when the plaintiff issues another writ, and the defendant pleads the statute, the plaintiff may reply the suing out and the return of the former writ, and that the same has been continued from term to term. And all the continuances must be regularly entered on the roll. It is likewise necessary that the plaintiff shall show the first writ to be returned, and upon this return, the continuances may be made, although another writ has not been taken out. The plaintiff may show, that the cause has been regularly continued by *vice comes non misit breve*, from the return of the writ to the time of declaring.<sup>1</sup> It seems to be generally agreed, however, that where an *original* is replied to the plea of the statute, it is sufficient to show when the writ issued, *without any continuances*; and that it is only where the process is like that of the King's Bench and Common Pleas, that the continuances must be set forth, to be entered to the time of filing the declaration, in order to show that it was for the *same cause of action*.<sup>2</sup> And this gives rise to the question, whether the writs of *capias* or *summons*, in this country, resemble more the *original writs* in England, or the *latitat* and *clausum fregit*. We have seen that the *latitat* and *clausum fregit* are both writs of *trespass*, and that the plaintiff may ground upon them declarations in *any* personal actions. But when the declaration is in *assumpsit*, for instance, a writ of *trespass*, issued within the six years, could not be presumed to be a writ which issued in that cause, unless it

867. The amendment of a declaration relates back to the time of the commencement of the suit. *Agee v. Williams*, 30 Ala. 636; *Bradford v. Edwards*, 82 Ala. 628. But *contra*, *Lagow v. Neilson*, 10 Ind. 188. The time when a new party is brought in by an amendment is the commencement of the suit as to him. *Brown v. Goolsby*, 84 Miss. (5 George) 437. And he is in as of the date of the original process, who is afterwards brought in and made a party, though as to him the statute may have run. *Bradford v. Andrews*, 20 Ohio St. 208.]

<sup>1</sup> Bul. N. P. 151; 1 Tidd, Prac. 91; *Karver v. James*, Willes, 257; *Harris v. Welford*, 6 Term R. 617.

<sup>2</sup> *Smith v. Bower*, 8 Term R. 662; *Beekman v. Satterlee*, 5 Cowen (N. Y.), 519.



was further shown, in the replication, that it was taken out with an intention of declaring in that action; and, *as evidence* of that intention, the continuances were entered from the time of issuing it to the time of filing the declaration. In case of an original, however, *proper to the action*, that ceremony can never be considered as necessary, because, if the declaration was in *assumpsit*, the original would show, that it was issued in case. If the declaration was upon a *bond*, the original would show it was issued in *debt*, and consequently that it was a proper and legal foundation of the action. And such being the correspondence between the writ and declaration, it must be presumed that they were for the same cause of action, unless the contrary is shown. And that this is the reason of the distinction between *originals* and the writs of *latitat*, and *clausum fregit*, will appear from this; that, whenever the writ which commences the action is of such a nature as to correspond with the declaration, it is sufficient to set it forth without the continuances, although it be not an original.<sup>1</sup> In the State of Pennsylvania, therefore, where the writs of *capias* and *summons* always specify the nature of the action, which is to be declared upon, it is held, that it is not necessary to observe the ceremony of entering continuances, in order to prevent the bar of the statute of limitations.<sup>2</sup> The practice in that State is to continue the process by an *alias* or a *pluries*, even after the intervention of more than one term.<sup>3</sup>

319. In New York, a plaintiff cannot avail himself of a *capias* issued to save the statute, although the same was regularly returned, entered on a continuance roll, and the continuances carried down to the time of the issuing of the process on which the defendant was arrested; unless he shows that the process on which the arrest was made is a continuation of the process originally is-

<sup>1</sup> Schlosser v. Leshner, 1 Dallas (Penn.), 411. And see Johnson v. Farwell, 7 Greenl. (Me.) 370; Mayo v. Rogers, 14 East, 538.

<sup>2</sup> Schlosser v. Leshner, 1 Dallas, 411. A second writ, in South Carolina, cannot be considered as an *alias*, if it be issued more than a year after the first, and all the intermediate writs must be regularly lodged with the sheriff, and cannot, at a subsequent period, be made out, so as to fill up the intermediate numbers, to prevent the statute. The means which apply to the English rule of making out the continuances out of court, namely, the expense and inconvenience of purchasing a new original, the court said, did not apply in that State, and a different practice prevailed in it. State Bank v. Baker, 3 M'Cord (S. C.), 281. See also Parker v. Grayson, 1 Nott & M'Cord (S. C.), 173.

<sup>3</sup> Pennock v. Hart, 8 Serg. & Rawle (Penn.), 369.

sued, as that it is an *alias* or *pluries*, &c. The continuation of the suit must be *proved*, and will not be presumed.<sup>1</sup>

320. In another case in New York, where, to a plea of the statute, that the defendants did not promise within six years, before the commencement of the suit, and the plaintiffs replied, that they did promise within six years, and, on the trial of the cause, proved the suing out of a *capias* before the accruing of the statute, but failed to produce the writ of *testatum capias* (or an authenticated copy thereof) whereon the defendants were arrested, and a verdict passed for the defendants, and such verdict was approved by the court; on a motion for a new trial, and on production of a certified copy of the *testatum capias*, the verdict was set aside on payment of the costs of the trial, and of all subsequent proceedings, on the ground, that, without such relief, the plaintiffs would lose their debt. If, however, the defendant, instead of pleading as in this case, that the cause of action did not accrue within six years before the exhibiting of the plaintiff's bill, and the bill or declaration was not in fact filed until more than six years after the accruing of the cause of action, *then* the plaintiff would have been bound to *reply specially* the suing out of the first process within the six years, and, by proper continuances, connect it with the process on which the defendant was arrested.<sup>2</sup>

321. It was argued, on another occasion, in the Supreme Court of the State of New York, in favor of a new trial, that the plaintiff failed to maintain the issue upon the statute, on account of the lapse of time between the issuing of the first *capias* and the *testatum capias*; that the intermediate time could not exceed six years; that the issuing of the original *capias* ought not to be more than equivalent to a new promise, which would continue in force for six years only; that all the intermediate processes stated by the continuance roll are said to be a fiction, which should not in justice be allowed to avail for more than six years. Mr. J. Cowen, in behalf of the court, said: "The continuance roll being produced, it imports absolute verity, like any other record, and surely cannot be contracted even by parol, much less by the assumption that it is false. *Non constat* that a *capias* may not have been regularly continued in truth during the whole time. If the record was improp-

<sup>1</sup> *Soulden v. Van Rensellaer*, 3 Wend. (N. Y.) 472. See also *Beekman v. Satterlee*, 5 Cowen (N. Y.), 519; *Bank of Orange Co. v. Knight*, 14 Wend. (N. Y.) 83.

<sup>2</sup> *Bank of Orange County*, *supra*.

erly made and filed, the course was to move that it be set aside for irregularity." In this case, seventeen years elapsed between the issuing of the *capias* and of the *testatum capias*.<sup>1</sup>

322. In order to save the statute on the ground of *unexecuted process*, in New York, the plaintiff must reply, that process was sued out and returned, *non est*, and connect it by continuances with the immediate process, on which the defendant was arrested.<sup>2</sup>

323. The fourth section of the statute of James provides, that, "if, in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill," that, in all such cases, the plaintiff, his heirs, &c., may commence a new action from time to time within a year, and not after; and the same provision includes outlawry reversed. Whenever this provision is replied, it has been no objection, that the damages in the former action are laid at a different sum, or that the *venue* was in a different county, if it be averred, that both actions were on the same promise, and for the same cause of action; for the amount of damages need not be proved, and actions of *assumpsit* are transitory.<sup>3</sup> The words of the section have been followed strictly; and the time, it has been held, within which a new action must be commenced, is to be computed from the day on which judgment was reversed, and not from the end of term of the court.<sup>4</sup>

324. The plaintiff sued the defendant, as administrator, on a

<sup>1</sup> *Ontario Bank of Rathburn*, 20 Wend. (N. Y.) 291.

<sup>2</sup> *Baskins v. Wilson*, 6 Cowen (N. Y.), 471.

<sup>3</sup> *Ld. Raym.* 484. [The mere action may be different in form if for the same cause. *Young v. Davis*, 30 Ala. 218.]

<sup>4</sup> *Com. Dig. Action on the Case upon Assumpsit*; *Lawes on Pleading*, 561; *Finch v. Lamb*, Cro. Car. 294. And see *Drane v. Hedges*, 1 Harr. & McHen. (Md.); *Lynch v. Withers*, 2 Bay (S. C.), 118; *Ivins v. Schooley*, 3 Harrison (N. J.), 269. [The Alabama act, authorizing action to be commenced within a year after a reversal of a previous judgment, applies to a case where, by the action of the inferior court, the cause was discontinued as to two of the defendants, and thus caused a reversal of the judgment as to the other defendant, although the case is not within the letter of the statute. *Givens v. Robbins*, 11 Ala. 156. But an action at law cannot be so commenced after the dismissal of a bill in chancery. *Roland v. Logan*, 18 Ala. 307. If the judgment be set aside on the ground that the suit was void, it is as if no action had been brought. A void suit is no suit at all. *Williamson v. Wardlaw*, 46 Ga. 126.]

simple contract debt due from the intestate, recovered judgment and took out execution, on which the officer returned *nulla bona*. The plaintiff then sued out a *scire facias* against the defendant, suggesting waste; and, while the *scire facias* was pending, the letter of administration was adjudged to be void, and a new letter of administration was granted to the defendant. A plea *puis darrein continuance*, alleging the invalidity of the plaintiff's judgment, by reason of the nullity of the first letter of administration, was supported as a bar to the *scire facias*, and within a year after this decision, but more than six years after the debt accrued, the plaintiff brought a new action against the defendant. It was held that this action was maintainable, within a proper construction of the proviso in the statute; namely, that, if a judgment for the plaintiff be reversed, by reason of error, or be given against him for matter alleged in arrest of judgment, after a verdict in his favor, he may, within a year, commence a new action.<sup>1</sup>

325. If an action be commenced within six years, and by *the death of one of the parties*, the action is *abated*, the statute has been so construed, that a new action may be commenced though the six years have expired.<sup>2</sup> In such case, however, the new action must be commenced within a *reasonable time*. In deciding upon what is a reasonable time, the courts have followed the equity of the views of the legislature, as expressed in the above-mentioned section of the statute of James, in respect to the reversal of judgments, which prescribes *one year*. "Though," said Chief Justice Treby, "the statute binds the right of the party, and therefore ought to be taken strictly, yet the party shall be bound to some reasonable time; and a year being the time which the law in many cases adjudged reasonable, therefore, if a writ be brought within

<sup>1</sup> *Coffin v. Cottle*, 16 Pick. (Mass.) 883. [Where the original trustees of the Real Estate Bank commenced suit on a claim not barred by the statute, and, after the limited time had expired, became nonsuit, and suit was afterwards commenced by the residuary trustees, it was held that the bar of the statute was saved by the first suit. *James v. Biscoe*, 5 Eng. (Ark.) 184. But where an action was commenced by A, as administrator of B, and continued from term to term, and afterwards the administration was revoked and granted to C, who commenced a new suit for the same cause of action, it was held that the latter could not be considered the same action as the former, and was barred. *Bennington v. Dinsmore*, 2 Gill (Md.), 848. Dismissal for want of jurisdiction is an abatement "in consequence of a defect in the form of proceeding." *Caldwell v. Harding*, 1 Low (U. S.), Dist. Ct. 826.]

<sup>2</sup> 6 Com. Dig. 844. [*Baker v. Baker*, 18 B. Mon. (Ky.) 406.]

six years, although it be discontinued by death, &c., and the six years expire, yet the statute of limitations will not be a bar, if another be commenced in a reasonable time; and a year shall be said to be a reasonable time.”<sup>1</sup> That the plaintiff is entitled to a reasonable time in such an event, and that one year is a reasonable time, has been repeatedly recognized in this country. Chief Justice Kent adopted the rule as above laid down, though there was, he said, no established rule.<sup>2</sup> It would seem, says Nelson, J., in *Huntington v. Brinckerhoff*,<sup>3</sup> from the paragraph in Buller’s *Nisi Prius*,<sup>4</sup> that this equitable construction is only applicable where the plaintiff died before the expiration of the six years; but this is, undoubtedly, he said, an error, as will appear from the authorities. Three of the judges, he said, fell into the same error, in *Jackson v. Horton*,<sup>5</sup> the point not being material, and their attention not particularly turned to it. Kent, Ch. J., he said, however, states the law in that case with accuracy.

326. If an executor sue upon a promissory note made to the testator, and die before judgment, and six years from the original cause of action expired, and his executor bring a new action in four years after the first executor’s death, it was held he was barred.<sup>6</sup> Upon the death of an assignee under the old bankrupt act of the United States, a right of action on a debt due to the bankrupt, vested in the executor of the assignee; and if an executor in such case do not cause himself to be made party to a suit brought in the lifetime, and in the name of the testator, and pending at his death, it is to be considered as a voluntary abandonment of the action, so as to exclude the executor from the equity of the exceptions to the statute.<sup>7</sup>

<sup>1</sup> 1 *Ld. Raym.* 434. [The reasonable time dates from the granting of letters of administration. *Curlewis v. Mornington*, 40 *Eng. L. & Eq.* 125. So, where a defendant pleaded partnership, and the suit was abated, and within a year and a day after the abatement the plaintiff brought a second suit. *Downing v. Lindsey*, 2 *Barr (Penn.)*, 382. But in a case somewhat similar in England, the court set aside a non-suit, and allowed the plaintiff to amend, to prevent the operation of the statute. *Crawford v. Cocks*, 3 *Eng. L. & Eq.* 594. See also *Carne v. Malins*, 6 *Ib.* 568.]

<sup>2</sup> *Jackson v. Horton*, 2 *Caines (N. Y.)*, 205. And see also *Schermerhorn v. Schermerhorn*, 5 *Wend. (N. Y.)* 513; *Huntington v. Brinckerhoff*, 10 *Ib.* 278; *Barker v. Mullard*, 16 *Ib.* 572; *Richards v. Maryland Insurance Company*, 8 *Cranch (U. S.)*, 84; *Brown v. Putney*, 7 *Wash. (Va.)* 302.

<sup>3</sup> *Huntington v. Brinckerhoff*, 10 *Wend. (N. Y.)* 278.

<sup>4</sup> *Page*, 150.

<sup>5</sup> *Jackson v. Horton*, 2 *Caines (N. Y.)*, 205.

<sup>6</sup> *Wilcox v. Huggins*, 2 *Stra.* 907.

<sup>7</sup> *Richards et al. v. Maryland Ins. Co.*, 8 *Cranch (U. S.)*, 84.

327. According to the tenor of the reasoning in the cases generally, and according to the express words of the Supreme Court of the United States, namely, that "in no case of a *voluntary* abandonment of an action, has an exception to the statute been supported,"<sup>1</sup> if, pending an action by a feme sole, the six years expire, and the suit abates by her marriage, she would be excluded from the equity of the exception. It is stated, however, in *Saunders*,<sup>2</sup> that if an action be brought by a feme sole within six years, and, pending the action, the six years expire, and then she marries, whereby the suit abates, it has been holden, that she and her husband may recently bring a new action within the equity of the statute; though the second action cannot in the nature of the thing be considered a continuance of the former writ. The annotator (Mr. Sergeant Williams) then proceeds to state: "As where F., and E., his wife, administratrix of J. E., her late husband, brought their bill in the King's Bench against the defendant for money laid out by the intestate; the defendant pleaded *non assumpsit infra*, &c.; the plaintiffs replied that E. when a widow, to wit, on such a day, brought her original writ, and before the return she married F., and they recently afterwards exhibited their bill against the defendant, rejoinder that E. married T. J., who was alive at the time of issuing the original; the plaintiffs surrejoined and tendered an issue; to which the defendant demurred; upon judgment given for the plaintiff in the King's Bench without argument, a writ of error was brought in the Exchequer Chamber, where it was argued for the plaintiffs in error, that the suit was abated by marriage, the *voluntary act* of the party; that the statute of limitations was a law of peace for the security of property, and ought not to be extended by equity; besides a suit commenced by bill cannot be continued by original. It was insisted for the defendants in error, that the new suit was brought within a *reasonable time*, namely, within two terms, whereas it has been holden that a *year* is a reasonable time. By the court: The statute has received a favorable construction; the suit was originally brought within the six years, the new suit within two terms, and the statute does not bar the action; it only takes away the remedy; and the judgment was affirmed."<sup>3</sup> In the Court of Appeals of South Carolina, Nott, J.,

<sup>1</sup> *Richards et al. v. Maryland Ins. Co.*, 8 Cranch (U. S.), 84.

<sup>2</sup> 2 Wms. Saund. 64, *h*.

<sup>3</sup> The learned annotator then cites *Forbes v. Lord Middleton*, cited in Mr. Durn-



said this was the only case he had found, where an action which has abated by the act of the party has been held to prevent the operation of the statute. But if the real ground, said he, was that the plaintiff was administratrix, and the abatement of the suit by her marriage should not prejudice the estate on that account, it left room to infer, that in any other case the bar would be effectual.<sup>1</sup>

328. But if an action be brought within six years, and after the expiration of that period the plaintiff be *nonsuited*, the act of limitations is a good plea to another action for the same cause at any time. This is different from an abatement of the action by the death of one of the parties; for, although the latter is in *form* a new action, it is in *substance* but a continuation of the old one. The plaintiff, in this case, is in no default, and it is not intended, that the statute meant to bar when the party has lost his trial by the act of God, if the action is renewed in a reasonable time. But the case of a *nonsuit* is unlike, for there the plaintiff has withdrawn from the trial, either voluntarily or in consequence of the opinion of the court against him, and the suit commenced afterwards is, therefore, to all intents and purposes, a new one. And when the legislature excepted the cases where the plaintiff had obtained a verdict or a judgment, they were doubtless aware, that actions sometimes went off on a *nonsuit*, and the exception, not extending to a *nonsuit*, is a very clear indication that they thought it ought not to be excepted. Besides, it is in the power of the plaintiff to suffer as many nonsuits as he pleases, and, by an artifice of this kind, he would be enabled to protract the trial, until the defend-

ford's note (E.) to *Karver v. James*, Willes, 259. The same authority is referred to without question or comment, by Nelson, J., in *Huntington v. Brinckerhoff*, *supra*. By Bronson, J., in *Barker v. Millard*, *supra*; and by Yates, J., in *Harris v. Dennis*, 1 Serg. & Rawle (Penn.), 288. In neither of the three cases, however, was the particular question before the court.

<sup>1</sup> *Barino v. McGee*, 3 M'Cord (S. C.), 452. [But where an action was brought within the limited time, but the attorney, mistaking the time of the sitting of the court, neglected to enter it, it was held that a second action brought after the expiration of the limited time was barred. *Packard v. Swallow*, 29 Me. (16 Shep.) 458. But if an attorney employed to bring a suit, being unable to attend on the return day, requests another person to attend for him, who, on objection of defendant, is not allowed to act, by reason of failure to prove his authority, whereby the suit fails, it is not a case within that clause of the statute which allows a new action to be brought within one year after the determination of the original suit. *Spier v. McQueen*, 1 Mann. (Mich.) 252.]



ant had lost his evidence. Thus, in an action for work and labor done as a physician, the defendant pleaded *non assumpsit infra sex annos*, and *actio non accrevit infra*, &c. ; to which the plaintiff replied that, within six years of the time of the cause of action, he commenced a suit, and that it was carried on till a certain time, which was above six years from the cause of action, when, by order of the court, he *was nonsuited* ; that afterwards he sued out the writ in the present action, and that both said suits were for the same cause, &c. : the court held a demurrer to this replication to be good, and had judgment entered for the defendant.<sup>1</sup> Where an action was brought before the expiration of the time limited, and there were continuances over until after that time, and then the plaintiff was nonsuited, it was held, upon a second action brought, that he was barred ; and this according both to the letter and the spirit of the statute, and to the uniform tenor of the decisions.<sup>2</sup>

<sup>1</sup> *Harris v. Dennis*, 1 Serg. & Rawle (Penn.), 286.

<sup>2</sup> *Barino v. McGee*, 3 M'Cord (S. C.), 452. If judgment be arrested or reversed for error, the plaintiff has one year thereafter within which he may commence a suit ; but there is no such saving in case of *nonsuit*. *Ivins v. Schooley*, 3 Harrison (N. J.), 269. And see *Richards v. Maryland Ins. Co.*, 8 Cranch (U. S.), 84. [On the 10th of April, 1847, the plaintiff commenced an action on a note dated July 24, 1841. The defendant pleaded a discharge under the insolvent laws. Plaintiff, on motion of the defendant, was required to specify the grounds upon which he should impeach the validity of the discharge, which he accordingly did. The case was continued from term to term, and at the trial the court refused to allow the plaintiff to give evidence of any facts not specified in his reasons for avoiding the discharge, whereupon the plaintiff became nonsuit ; and on the 19th of August, 1849, brought another action upon the same note. Held, that the second action was barred. *Swan v. Littlefield*, 6 Cush. (Mass.) 417. In *Crawford v. Cocks*, cited *ante*, § 825, note, a nonsuit was taken off, and the plaintiff allowed to amend to avoid the operation of the statute. To a plea of the statute in an action on an official bond, a former suit, in which there was a nonsuit, cannot be replied. *State v. Hawkins*, 6 Ired. (N. C.) 428. The statute in North Carolina is held to apply to cases where there has been a nonsuit as well as where there has been a verdict which has been set aside, although the case of a nonsuit is not mentioned. *Long v. Orrell*, 18 Ired. 128. And if a suit at law be commenced and continued till the time limited against such suit has expired, the plaintiff may take a nonsuit, and bring a bill in equity for the same cause of action, within one year after the nonsuit. *Hall v. Davis*, 3 Jones, Eq. (N. C.) 418. And in Ohio, although the statute does not give an executor specifically the right to commence a new action after a nonsuit, the statute having expired, yet it is held to be within the equity of the statute. *Haymaker v. Haymaker*, 4 Ohio [N. S.], 272. The proviso that the plaintiff may commence a new action within a year after suffering a nonsuit means that the plaintiff must be the same, and the cause of action, but the defendant may be different. *Williams v. Council*, 4 Jones, Law (N. C.), 206. A non-

329. It has been held, that if a man sue in *chancery*, and, pending the suit there, the statute attaches on his demand, and his bill is afterwards dismissed, as being a matter properly determinable at law, the right of action will be preserved. Lord Chancellor King said, that, in such a case, he would take care to preserve the plaintiff's right, and would not suffer the statute to be pleaded, in bar to his demand.<sup>1</sup> But in a subsequent case, where a bill had been depending in *chancery* for six years, Lord Hardwicke held, that the bill was not such a demand as to take the debt out of the statute.<sup>2</sup> So, in Virginia, it has been held, that if a bill in *chancery* be dismissed, on the ground that the plaintiff's claim is exclusively cognizable at law, the pendency of such suit in *chancery* cannot be pleaded to prevent the limitation from being a bar to his subsequent recovery at law.<sup>3</sup> In the State of New York, previous to the revised statutes, the time that the holder of a note was stayed by an injunction from *chancery* from prosecuting the same, could not be replied in bar of a plea of the statute of limitations, and no case, the court said, by Bronson, J., had they met with where it was held, that an injunction out of *chancery* would suspend the running of the statute. The remedy of a party stayed, previous to the revision, was by application to *chancery* to restrain the defendant from pleading the statute.<sup>4</sup>

330. In the court of *chancery*, previous to the statute of 4 Anne, c. 16, § 22, it was not necessary to file the complainant's bill before the issuing and service of the subpoena to appear and answer; it being sufficient if the bill was afterwards filed; the

suit entered upon failure of the plaintiff to appear when called is not an abandonment of the suit within the meaning of the statute. *Devalcourt v. Dillon*, 12 La. An. 672. The dismissal of an action duly commenced within the period of limitation, because of an accidental omission of the clerk to enter it seasonably on the docket, is a defeat of the action for matter of form within Rev. Stat. c. 120, § 11. *Allen v. Sawtelle*, 7 Gray (Mass.), 165. And so is a dismissal, for want of jurisdiction, in case of a trustee process brought in the wrong county. *Woods v. Houghton*, 1 Gray (Mass.), 580. The court will protect parties against the consequence of mistakes of the clerk, where they would not aid them had the mistake been their own. *Nazev v. Wade*, 1 Ellis, B. & S. 728. But in Maine it is held that wrong venue is not matter of form. *3 Heath* (38 Me.), 217. A mistake as to the form of the remedy is not "negligence in the prosecution." *Flouncey v. Jeffersonville*, 17 Ind. 169.]

<sup>1</sup> 1 Vern. 74.

<sup>2</sup> 1 Atk. 1. See *Ib.* 282.

<sup>3</sup> *Gray v. Berryman*, 2 Munf. (Va.) 181. See also *Ex parte Hawks*, 1 Cheves (S. C.), Eq. 203.

<sup>4</sup> *Barker v. Millard*, 16 Wend. (N. Y.) 572.

suit, as against the defendant himself, was then considered as commenced from the teste of the subpoena, as in suits at law commenced by original writs.<sup>1</sup> At the present day, the filing of a bill and taking out the subpoena, and making a *bona fide* attempt to serve it, is the commencement of a suit in equity as against the defendant himself, so as to prevent the operation of the statute, if the suit be afterwards prosecuted with due diligence.<sup>2</sup> But an amended bill making new parties has no relation to the commencement of the suit, for the purposes of the statute, and the statute will avail them at the period when they are made defendants. Until the defendants are made parties to the bill, the suit cannot be considered as having been commenced against them. "It would," say the Supreme Court of the United States, "be a novel and unjust principle to make the defendants responsible for a proceeding of which they had no notice, and when a final decree in the case could not have prejudiced their rights."<sup>3</sup>

331. But a bill filed by one creditor, as plaintiff, in behalf of himself and others, will prevent the statute from running against any of the creditors, who came in under the decree. Every creditor has, after the filing of a bill, an inchoate interest in the suit, to the extent of its being considered as a demand, and to prevent his being shut out, because the plaintiff had not obtained a decree within the six years.<sup>4</sup>

<sup>1</sup> *Hayden v. Bucklin*, 9 Paige (N. Y.), Ch. 512. That such was the decision of Lord Nottingham, was cited *Pigott v. Nowen*, 8 Swanst. 580, copied by the reporter from Lord Nottingham's notes.

<sup>2</sup> *Hayden v. Bucklin*, *supra*; *Webb v. Pell*, 1 Paige (N. Y.), Ch. 564. [And the filing of the bill is the commencement of the action, although the subpoena be not taken out till the limitation has expired. *Morris v. Ellis*, 7 Jur. 418. See also *Purcell v. Blannerhasset*, 8 J. & L. 24. Where a bill was filed in 1819, and, the plaintiff having died in 1825, a bill of revivor was filed in 1828, and the defendant, continuing absent, and no appearance being entered, and one of the defendants having died in 1835, a bill of revivor was filed in 1838, and, the remaining defendant being still out of the jurisdiction of the court, service of the subpoena was then effected under 2 Will. 4, c. 88; it was held that the bill of 1828 prevented the bar of the statute, with an intimation that the bill of 1819 would have done the same. *Foster v. Thompson*, 2 Con. & L. 568.]

<sup>3</sup> *Miller v. M'Intyre*, 6 Peters (U. S.), 61. [If during the pendency of a suit in chancery, any new matter or claim is set up by the complainant, the defendant may insist upon the benefit of the statute until the time when the new claim is presented. *Dudley v. Price*, 10 B. Mon. (Ky.) 84. Even though founded upon papers previously made exhibits in the case. *Christmas v. Mitchell*, 8 Ired. (N. C.) Ch. 535.]

<sup>4</sup> *Sterndale v. Hankinson*, 1 Simon, Ch. 393; and 2 Con. Eng. Ch. 197.

332. In *Stafford v. Bryan*,<sup>1</sup> in the New York Court of Chancery, the suit was not commenced until nearly eight years after the acknowledgment and promise ; and although the complainant commenced two suits in the Supreme Court in the mean time, one of which was discontinued, and in the other he was nonsuited because he could not then prove sufficient to take the case out of the statute, it was held by the chancellor that neither of those suits could avail any thing.

<sup>1</sup> *Stafford v. Bryan*, 1 Paige (N. Y.), Ch. 289.

## CHAPTER XXIX.

## OF REAL PROPERTY AND THE LIMITATION OF REAL ACTIONS.

333. No code or system of jurisprudence has ever prescribed a title to property in land, which more evidently foreshows a highly civilized condition of society than that established by the municipal law throughout this country. The possession of the landowner by the local law of every State is, at least to every intent and purpose, as near to being *allodial* as was that of the Roman landholder under the jurisprudence of Justinian. All understand that the term "allodial" is used to denote property in land *absque aliquo inde reddendo*, or of undivided dominion; and that it is thus essentially distinguishable from the term *tenure*, which is significant of an estate retained by a superior.<sup>1</sup> The peculiar qualities of allodial land are alienation at the will of the owner, availability as security for the performance of private contracts, liability to be taken and sold by creditors in extinguishment of their claims against dishonest, contumacious, or bankrupt debtors, and, in short, fitness to meet both the natural wants of individuals, and the exigencies of society.<sup>2</sup> Between these concomitants of land-title, and those of the land-title introduced into Southern and Western Europe by the barbarians of the North, who subverted the empire of Rome, there was nothing consentaneous. The latter were those of dependency, vassalage, and prohibition. The right of the feudal possessor, of whatever grade, consisted alone in the usufruct, or profits yielded by the land, either in a state of nature, or under a state of rude and immethodical cultivation. The superior right, the *jus proprietatis*, or (according to the expression used by the early English lawyers) the *feudum dominans*, or (according to that used by modern lawyers) the *fee*, remained in the lord, or principal military conqueror, from whom the limited and incum-

<sup>1</sup> The Roman land-owner did not hold of any superior. This possession was perfectly allodial, and wholly independent; and tenures were equally strangers to the English before the feudal policy was introduced. 1 Brown's Civil Law, Ch. III.

<sup>2</sup> 3 Kent's Com. 497.

bered right was in the outset derived. Such a project of the law of landed property formed by degrees, after the Norman conquest, an anomalous complexedness in the English law in respect both to titles to possession of, and property in, land, and the judicial methods of enforcing them. The existence of the latter, after having been lingeringly prolonged in the country of their nativity, for a very considerable period, has, within a few years, received a decisive and fatal blow. And yet (the fact is strange, if not incomprehensible) those relics of a barbarous age still give a feudal aspect to the otherwise sightly and striking fabric of American jurisprudence.<sup>1</sup> No lawyer, it is presumed, is disposed to detract from the intrinsic merit discoverable in the piles of learning which have accumulated upon the feudal constitution, or will cease to admire the dignity and proportion, under which attractive qualities it has been exhibited by the illuminations of Fearne, Hargrave, Blackstone, and other fixed and inextinguishable "gladsome lights" in English jurisprudence. But (and more especially is it so in our country) new social exigencies, different interests, and an entire revolution in public sentiment, it is to be supposed, would render a continued adherence to judicial forms proceeding from such a source, offensive, as well as incongruous and disadvantageous. Certainly, an overweening respect for them, in those whose condition enables them to exert control or influence over legislation, conflicts with the obvious maxims of prudential civil administration, and is not justified, even by the policy (social necessity) upon which the ancient feudal framework itself was reared upon the dispersed fragments of Roman civilization.

334. Without stopping to inquire, how it was originally with the Saxon government and civil policy in England, it is not questioned that the feudal system, in the rigid, military form, characteristic of Normandy, was, in less than a quarter of a century from the conquest, firmly established throughout England, after the example of the French, who had before, but more gradually, surrendered all their allodial lands into the hands of the king, who returned them to the owners as a *beneficium* or feud. Hence, the maxim of the Anglo-Norman law, that the king is the lord paramount and supreme proprietor of all the lands in the kingdom, and is not

<sup>1</sup> See *Inman v. Barnes*, 2 Gallis. (Cir. Co.) 318; *Barnet v. Ihrie*, 17 Serg. & Rawle (Penn.), 174.

bound by services to any superior.<sup>1</sup> But, although such has ever been acknowledged as the fundamental principle of the English law of real property ever since the conquest, it has now become more of a fiction than a positive inconvenience; so that real estates are now held in England by a title free and unconditional, and essentially allodial. It was not, however, until the abolition of military tenures, in the reign of Charles II., that the feudal relation of lord and tenant entirely ceased to exist; and, consequently, the reported causes in the courts, from the Year Books (which are redundant with writs and pleadings in real actions) down to the period of the Restoration, are, to the student, more curious as historic memorials (like cumbersome ancient armor) than in fact useful. Among the reasons which have been assigned, by the learned and venerable commentator on American law, why a very large proportion of the matter contained in the old reporters, prior to the English revolution, is now "cast into the shade," is the disuse of the subtleties of special pleading and of *real actions*.<sup>2</sup>

335. Rules and maxims of the law of real property in England, which were once suitable and rational, have been appealed to and maintained, since the Restoration, to an extent beyond what is justified by the modern state of society, and the changes in the modifications of property. Many abuses have been corrected, and many improvements have been introduced by the judges. Statutes have also been passed on the spur of the occasion, yet with but slight regard to harmony. In the time of the Commonwealth a commission was appointed to consider of legal reforms, over which Sir Matthew Hale presided, and of which several other very eminent lawyers were members; but their labors were frustrated by the disordered state of the times: so that, from the reign of Ed-

<sup>1</sup> The king, however, cannot grant an *allodial* title, or grant land to which the reservation of *tenure* is not annexed, even by the express words of *absque aliquo inde reddendo*. Wright on Tenures.

<sup>2</sup> 1 Kent, Comm. 487. "There is such a mass of intricate and obsolete law in all the old reporters, including even Plowden, Còke, and Saunders, as renders it eminently unadvisable for the student to attempt a continuous perusal of them." Warren's Law Stud. 840. "There is something proverbially repulsive in the form and structure of our early reports; which, to say nothing of their dreary black-letter, Norman French, dog Latin, are stuffed with all manner of obscure and ridiculous pedantries, scholastic as well as logical, involving the simplest points in endless circumlocutions and useless subtleties." Ibid.



ward I. till the issuing of the commission in the ninth year of the reign of George IV., there has been no general revision of the English law. The incidents of military tenure thus continued to be referred to in judicial argument, although long before abolished, and the manifest intention of parties to a deed continued liable to be defeated, because it was supposed in law, that there must always be a tenant seised of the freehold to attend the lord's court, and to defend any real action that might be brought by an adverse claimant. Thus, too, much perplexity and confusion have been occasioned by the entire want of system in the various periods of limitation, and the incongruous variety of remedies allowed for the recovery of real property.<sup>1</sup>

336. The time at length arrived when the astounding number of real actions, and actions pertaining to the realty, enrolled in the annals of English jurisprudence, with the exception of a petty remnant, was, at a single blow, annihilated. Not longer since than the reign of William IV. (by the statute of 3 and 4 Will. IV. c. 27), all real and mixed actions, with the exception of the writ of right of dower, or the writ of dower, *unde nihil habet, quare impedit*,<sup>2</sup> and ejectment, were utterly abolished;<sup>3</sup> and, by the same statute, the right and title of the real owner of land are extinguished, and in effect transferred to the person whose possession is a bar to the remedy, at the end of twenty years, under the statute of 21 James I. c. 16.<sup>4</sup> Thus, in the congratulatory language and somewhat rapturous mode of expression of a late English author, "The 'blessed amending hand,' to adopt the language of the famous Edmund Plowden, has grasped, as it were, the very heart-strings of the law. The statute for the limitations of actions, &c. (3 and 4 Will. IV. c. 27, § 36), has swept away, — shade of Fitzherbert! — indiscriminately, between fifty and sixty species of actions, — a most fertile source of difficulty and confusion to the reader of our ancient laws, — leaving only six, or, at the most, nine (including

<sup>1</sup> Report of Real Property Commissioners.

<sup>2</sup> The action of *quare impedit* is brought by a person complaining that he has been improperly deprived of *ecclesiastical patronage*, — an action now of rare occurrence in England, there having been but seven cases in which it was brought for the last fourteen years. Warren's Law Studies, 262.

<sup>3</sup> See *ante*, pp. 12, 13, 14. And section xxxvi. of the statute referred to in Appendix, p. xiv.

<sup>4</sup> See *ante*, § 5. And section xxxiv. of the statute referred to, in Appendix, p. xiv.; and *Incorporated Society v. Richards*, 1 Dru. & Warr. Ch. 258.

the three real and mixed) forms of action now known or used in the common law.”<sup>1</sup>

337. The establishment of a limitation of twenty years, and the abolition of real actions, was recommended by the English real-property commissioners, as tending “greatly to diminish litigation, and saving the owners of real property from much vexation and expense to which they are at present exposed, sometimes in defending their possession, and still more frequently when they attempt alienation.” By the alteration they propose, say they, “the practical, efficient remedy for recovering possession would not be impaired.” Before they ventured, however, they state, to recommend so important a measure as the entire abolition of real actions, they made diligent inquiry into the practical operation of this system of law, and from the result, they conclude that “*it would have been beneficial to the community if real actions had been abolished from the time when the modern action of ejectment was devised.*” Many real actions have been brought in England, within the last one hundred years, after the remedy by ejectment was barred; but the commissioners could not learn that more than one or two had succeeded; that “they have generally originated in schemes of unprincipled practitioners of the law, to defraud persons in a low condition of life, of their substance, under pretence of recovering for them large estates, to which they had no color of title.”

338. In the English colonies of America land was considered as partaking, much more than in England, of the nature of commercial property; and the title to lands in this country has ever been essentially allodial.<sup>2</sup> In the State of Maryland, before the year 1732, it was true, as a general rule, that the lands were no otherwise liable to be taken or extended, in satisfaction of debts, than according to the law of England; and, prior to that time, there are many instances in which lands were so extended by *elegit*. But the peculiar circumstances of the province, the scarcity of money, and the small porportion of personal to real estate, seem to have given rise to a wish among the people, that land should, in

<sup>1</sup> Warren's Law Studies, 24. “We will conclude,” says Lord Coke, in closing his Institutes, “with the aphorism of that lawyer and sage of the law (which we have heard him often say), ‘Blessed be the *amending hand*.’” Lord Coke's Fourth Inst. Epsil. Warren's note.

<sup>2</sup> Coombs v. Jordan, 8 Bland (Md.), Ch. 302, which refers to Attorney-General v. Stewart, 3 Meriv. Ch. 158.

some way, be made entirely subject to be seized and sold for the satisfaction of debts. This general disposition is indicated by some principles peculiar to the law of Maryland, in relation to imperfect legal titles, to equitable interests in land, and to the real estates of deceased debtors, which were established as a part of the Maryland code antecedent to that period.<sup>1</sup> The tenure prescribed in all the old colonial charters or patents was free and common socage, and even that does not exist in some of the United States; and, if it can be said to exist anywhere in this country, it is only in theory, as it partakes of the essential qualities of allodial estates.<sup>2</sup> An estate in fee-simple, in the United States, now simply means an estate of inheritance; and whether a person holds his land in pure *allodium*, or has an absolute estate in fee-simple, is considered perfectly immaterial; for his title is virtually, and for every essential purpose, the same.<sup>3</sup> Under the New York statute of 1787, the notion of realty, in the technical sense of the feudal law, was entirely exploded; “unless,” says the author of *Commentaries on American Law*,<sup>4</sup> “it may be supposed to be lurking in the general declaration, that the people of the State, in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State.” “And thus,” adds the same learned writer, “by one of those singular revolutions incident to human affairs, allodial estates, once universal in Europe, and then almost universally exchanged for feudal tenures, have now, after the lapse of many centuries, regained their primitive estimation in the minds of freemen.”<sup>5</sup>

339. Yet, to this day, in the United States, although “the insolent right of primogeniture,” as Gibbon calls it, has been very generally abolished, together with the preference given to males in

<sup>1</sup> See opinion of the court in *Coombs v. Jordon*, 3 Bland (Md.), Ch. 303. The obligations of feudal tenure are not recognized by the earliest laws of Massachusetts. From the discretion vested in the courts, it was some time before the law of descents was settled with precision; and the law which gave a double portion to the oldest son was not repealed till 1789. The first legal tribunals of the country were formed upon a plan of almost patriarchal simplicity; the legislative and judicial functions being generally united in the same persons; and the *forms* of judicial proceedings were, for a considerable time, but little known or regarded. See *Stearns on Real Actions*, 61.

<sup>2</sup> 1 Story's Com. on the Const., in which the substance of them is stated. Socage is a tenure of land by certain services in husbandry, and not knight's service.

<sup>3</sup> 3 Kent's Com. 513.

<sup>4</sup> Ibid.

<sup>5</sup> 3 Kent's Com. 513. And see *Cornell v. Lambs*, 2 Cow. (N. Y.) 612.

titles, by descent, we remain, in respect to the remedies attached to the feudal system, tenacious of its vestiges. It is, indeed, "a sort of anomaly in the history of jurisprudence."<sup>1</sup> By the revised statutes of New York, however, real actions have been abolished, and the action of ejectment retained, without any of its ancient fictions,<sup>2</sup> and extended to all cases in which a person is entitled to recover an estate in any land, in fee, or for life, either as heir, devisee, or purchaser; and by those of Massachusetts<sup>3</sup> and Maine,<sup>4</sup> all writs of right, and of formedon, and all writs of entry, with the exception of those on demandant's own seisin, have been abolished. The commissioners on the civil code of Pennsylvania, in 1835, were of opinion, that the action of ejectment might be modified, so as to be resorted to as a substitute for the greater part at least of real actions;<sup>5</sup> but they are, nevertheless, retained as part of the law of that State, though the action of ejectment is the only one in common use.<sup>6</sup> A writ of entry, *sur disseisin*, &c., may be maintained in Pennsylvania, though the action is not encouraged in cases where an ejectment will answer as a complete remedy.<sup>7</sup> The writ of right and possessory real actions in Virginia were put under statutory limitations, as late as the year 1830;<sup>8</sup> and as late as the year 1834, there was a decision in an action of *formedon in remainder* in New Hampshire, in which a *common recovery*, levied in 1819 (the defence to the action), was learnedly discussed.<sup>9</sup> The writ of right was retained by the territorial law of Michigan, and the writ of disseisin by statute in Indiana.<sup>10</sup> Real actions may be considered in force in all those States, which were colonies, as a part of the common law, unless they have been expressly abolished, although, if a statute expressly declares that twenty years' possession will give a title, real actions must be brought within that time. Actions of formedon were held to be within the statute of twenty years' possession of Rhode Island of 1766.<sup>11</sup> The action

<sup>1</sup> 4 Kent's Com. 71, note.

<sup>2</sup> 2 New York Rev. Stat. 303, 382, 348.

<sup>3</sup> Mass. Rev. Stat. part 3, c. 101, tit. 8, § 51.

<sup>4</sup> Maine Rev. Stat. c. 145, tit. 10, § 1.

<sup>5</sup> Report of Commissioners on Civ. Code of Pennsylvania, 58, 59, cited in note in 4 Kent's Com. 71.

<sup>6</sup> *Barnet v. Ihrie*, 17 Serg. & Rawle (Penn.), 174; and s. c. 1 Rawle, 44.

<sup>7</sup> *Witherow v. Keller*, 11 Serg. & Rawle (Penn.), 271.

<sup>8</sup> See Appendix, p. lxxxi.

<sup>9</sup> *Frost v. Cloutman*, 7 N. H. 9.

<sup>10</sup> Rev. Stat. Indiana, 1838.

<sup>11</sup> *Inman v. Barnes*, 2 Gall. (Cir. Co.) 815. And see *Inglis v. Sailors' Snug Harbor*, 5 Peters (U. S.), 187; and *Barnet v. Ihrie*, *supra*.

which has been, and is, most commonly used in Rhode Island, for the recovery of real property, is *trespass and ejectment* (a simple proceeding), which, by the late revision of the statutes of that State, is limited to four years; the claimant being thus left, at the end of that period, to his remedy at common law.<sup>1</sup>

340. Still it must be agreed, that, in those States where real actions have been continued in practice (stripped, as they have been, of the cumbrous appendages of *essoins*, *protections*, *aid-prayers*, *vouchers*, and *parol demurrers*, which made them intolerable in their native country), they have been judiciously adapted to the advancement of justice, and to the correct decision of questions of title to real property.<sup>2</sup> More especially has such been the case in Massachusetts. The action of ejectment has never been at all in use in Massachusetts, for the trial of titles, and the law commissioners, who reported the late revised statutes, did not propose to require it. They proposed to retain the *writ of entry*, which had been commonly used, as being simple and convenient, and much more effectual than ejectment. In the writ of entry which they proposed, the claimant alleges that he was seised of the premises within twenty years, and has been disseised by the tenant; if so, he now has a right of entry, and upon the general issue this is substantially the question to be tried, which is precisely the same as upon the general issue in ejectment.<sup>3</sup> It appears, therefore, that this writ of entry is adapted to try the same title, and substantially in the same manner, as is done in the action of ejectment, and in a form more simple and convenient. But the principal ground of preference is stated to be, that the writ of entry is a much more *effectual* remedy. A judgment in ejectment is no bar to another action for the same land and upon the same title; but a final judgment in a writ of entry is a bar to another action of the same kind, and by the abolition of writs of right and form-don there is no action of any other kind by which the matter decided in the writ of entry can be again litigated between the same parties; and of course the judgment obtained in the writ of entry is conclusive. The statute of James I., as to twenty years' possession, was not adopted in New Jersey, by force of the act of 1727, the action of ejectment having always been considered on the same footing as the writ of right.<sup>4</sup>

<sup>1</sup> See Appendix, p. lvi.

<sup>2</sup> Stearns on Real Actions.

<sup>3</sup> Notes to Rep. of Mass. Com. Part iii. p. 154.

<sup>4</sup> *Gardner v. Sharp*, 4 Wash. (Cir. Co.) 609.

341. To constitute a complete title to land, there are two requisites, namely, the right to possession and the right to property, or, as it is expressed in Fleta, *juris et seisinæ conjunctio*; <sup>1</sup> and real actions are designated and limited in reference to the interest claimed by the demandant. They have been divided into actions *droitural*, or those in which the demandant sues in respect of his mere right (*jus proprietatis*), his possessory claim having been lost; and into actions possessory, in which he sues upon his possessory right, not being under the necessity of proceeding upon his mere right. The former, when brought upon the demandant's own seisin, are *droitural*, but, where the demandant claims a mere right by descent, are *ancestral droitural*. The second are *possessory*, upon the demandant's own possession, and *ancestral possessory*, when claiming a right of possession through an ancestor. <sup>2</sup>

342. Before the statute of 32 Hen. VIII., as has been already shown, <sup>3</sup> actions brought for the recovery of land, and other things real, were limited from some particular memorable event; and that by that statute a more proper course was taken, and one calculated for all times, it limiting such actions, as it has been expressed, "according to a fixed interval of antecedent time." <sup>4</sup> It provided, that where in any writ of right, or any action possessory, the demandant claimed upon his own seisin, it must be a seisin within thirty years back; and where, on the seisin of his ancestor, it must (in a writ of right) be a seisin within sixty, or (in a possessory action) within fifty years. <sup>5</sup> Afterwards, by the statute, 21 James I. c. 16, it was enacted, that all writs of *formedon* should be brought within twenty years after the title or cause of action first descended or fallen; <sup>6</sup> and, by the same statute, it was enacted, that no person should make *entry* into lands, tenements, or hereditaments, but within twenty years after his right should first accrue. From this last enactment it resulted, that the same period of twenty years also became the limitation in every action of ejectment, inasmuch as the right to bring that action is founded

<sup>1</sup> L. 3, c. 15, § 5; *Atkins v. Horde*, 1 Burr. 60; 8 Cruise, Dig. 488; 2 Hill. Abr. Real Property, 177; *Smith v. Lorillard*, 10 Johns. (N. Y.) 833.

<sup>2</sup> Rosc. on Real Actions, 2; *Markal's case*, 6 Rep. 8, b. See the various species of writs growing out of the above divisions, enumerated, and *eo nomine*, abolished by sec. 36 of the Stat. 3 and 4 Will. IV., in Appendix, p. xiv.

<sup>3</sup> *Ante*, Ch. II.

<sup>4</sup> 3 Steph. New Com. 546.

<sup>5</sup> 8 Bl. Com. 189. And see Stat. 32 Hen. VIII., in Appendix, p. i.

<sup>6</sup> See the Stat. in Appendix, p. iii.



upon the right of entry. Thus stood the law of the limitations of real actions in general, during the whole of the long period that elapsed, from the 32d year of the reign of Hen. VIII. to the late reign of Will. IV.<sup>1</sup>

343. The writ of *droitural*, or writ of right, is denominated the highest writ in the law, and lies for him who is entitled to an estate in fee-simple, and not for him who has a less estate.<sup>2</sup> For an estate in fee-simple, it lies *concurrently*, with all other real actions, in which an estate may be recovered; and also lies *after* the other remedies are lost, being as it were an appeal to the mere right, where judgment has been had as to the possession, in an inferior possessory action.<sup>3</sup> But in case the right of possession is lost by length of time, or by judgment against the true owner, in one of these inferior suits, this is then the only remedy that can be resorted to; and it is of so forcible a nature, that it overcomes all obstacles, and removes every objection that may have arisen to obscure the title. After issue has once been joined in this writ, the judgment is absolutely final. A recovery upon it, therefore, may be pleaded in bar of any other claim or demand to the same estate.<sup>4</sup> The *mise* in a writ of right, is considered to put in issue the whole title, and includes the statutes of limitations. Hence, if a plea, after the *mise*, denied the seisin of the ancestor, within the time prescribed, it is bad on special demurrer.<sup>5</sup>

<sup>1</sup> See *ante*, Ch. II., § 15, and Stat. of 3 and 4 Will. IV. in Appendix, p. vi.

<sup>2</sup> Wms. Saund. 175; 3 Black. Com. 193; F. N. B. 1.

<sup>3</sup> F. N. B. 1, 6. It has been held, in Maine, that an heir may maintain a writ of right, on the seisin of his ancestor, at any time within thirty years after the commencement of the disseisin, although the ancestor had been disseised for more than *twenty* years, at the time of his decease; for the right of property may exist, without either the possession or the right of possession; and if the right of property remain, after the possession is gone, there is no difficulty in considering it as descending upon the heir, unless it is destroyed by the statute of limitations. It is upon the principle, that suits are maintained on simple contracts, more than six years after the right of action accrued, if brought within six years after an acknowledgment or new promise. *Mason v. Walker*, 2 Shep. (Me.) 168. As to the similitude of a new promise or acknowledgment, see *ante*, Chap. XX.

<sup>4</sup> Co. Litt. 158; 3 Black. Com. 194.

<sup>5</sup> *Ten Eyck v. Waterbury*, 7 Cowen (N. Y.), 51. A writ of right *patent* is so called, because it is an open letter of request or command given and expressed to full view, in contradistinction to writs *close*, which are always closed up and sealed, or are supposed to be closed up and sealed and directed to particular persons. 2 Bl. Com. 346; 3 Ib. 195. In the United States, all writs of right are returned into the common-law courts of the State, and are directed to, and returnable by, the sheriffs or



344. To maintain a writ of right, an *actual* seisin, either in the demandant himself, or in the ancestor from whom the demandant claims, by taking the *explees*,<sup>1</sup> must, in England, have been shown within the period of the prescribed limitations. The decisive fact of *such* seisin, both in an action *droitural* and an action *ancestral droitural*, has been required from the earliest periods of the English law. This was a peculiarity in a writ of right, for, in all possessory actions, a seisin in law was sufficient.<sup>2</sup> Upon the death of the ancestor, a seisin in law is cast upon the heir, but not until he actually enters has he *actual* seisin. If there had been an abatement before he entered into the possession of the inheritance, he could have maintained no right upon his own seisin against the abator, inasmuch as the only seisin he could prove in himself was a seisin in law, he not having taken the explees or profits of the land. Yet he might have maintained a writ *ancestral droitural* upon the seisin of the ancestor, who had taken the explees in his lifetime, because the limitation of such writ, by the statute of 32 Henry VIII., is longer, viz., sixty years.<sup>3</sup> But his seisin in law was sufficient for him to maintain, within thirty years, a writ of entry *sur abatement*.<sup>4</sup> The reversioner or remainder-man, upon whom a seisin in law had been cast by the death of the particular tenant, might resort to his writ of entry *sur intrusion*, but, without having taken the profits, he could not have maintained a writ of right.<sup>5</sup> But where A is tenant for life, remainder to B for life, remainder to the heirs of A, and A dies, and B enters and dies, and a stranger intrudes, the seisin which A had, as tenant for life, is sufficient for A's *heirs* to maintain a writ of right.<sup>6</sup> So where L and M are joint tenants, remainder to the heirs of L, and L dies, and a recovery is had against M, the heir of L shall have a writ of right for the whole, on M's seisin, as well as on L's,

other public officers. They are, therefore, writs of right *close*, and subject to the general doctrines of the common law, applicable to such writs. See Wheaton's note to *Liter v. Green*, 2 Wheat. (U. S.) 815.

<sup>1</sup> Explees, or esplees, are the products which the land yields; as the hay of the meadow, the herbage of the pasture, the corn and other produce of the arable ground, rents, or services. *Termes de la Ley*.

<sup>2</sup> Reeves's Hist. Eng. Law, 428; 5 East, 272; 2 Bos. & Pull. 570; 8 Cruise, Dig. 490; *Leonard v. Hill*, 10 Mass. 281; *Copp v. Lamb*, 8 Fairf. (Me.) 312; *Speed v. Burford*, 8 Bibb (Ky.), 57.

<sup>3</sup> See the Stat. of Hen. VIII., Appendix, p. i.

<sup>5</sup> Prest. *supra*, 301.

<sup>4</sup> 2 Prest. Abst. of Title, 298.

<sup>6</sup> Vin. Abr. *Droit de Recto*.

because joint tenants are seised *per my et per tout*.<sup>1</sup> Where the demandant claims by descent, from a devisee under a will, he must allege and prove an actual seisin, by the taking of the explees or profits, in such devisee. Thus where an estate was devised to A for life with remainder to B in fee, and B died in the lifetime of A, so that he had only a vested remainder, but was never actually seised, and his heir brought a writ of right, it was held, that the action could not be maintained in any form, because neither B nor the demandant was ever actually seised.<sup>2</sup>

345. It has been held, in the State of Kentucky, that the demandant in a writ of right, to maintain it, must prove an actual seisin;<sup>3</sup> but where A, being seised of lands, sold it and repurchased it, it was held, that he might have a writ of right on his seisin before the sale.<sup>4</sup> But it has been expressly decided in this country, that the strict rule of the English law, requiring actual seisin, is not applicable to the condition of this country, where so very large a part of real property consists of wild and uncultivated lands, remote from settlements.<sup>5</sup> The English distinctions between actions *droitural* and actions *possessory* have not been much regarded in Massachusetts, there having been, in the practice of that State, no difference in respect to the nature of the seisin requisite to maintain them. Whoever, in that State, has had the title, has also had a seisin in deed, either by an actual entry or intendment of law; and the explees may be considered as united to the title, so as to enable the party to maintain a writ of right.<sup>6</sup> In Virginia, writs of right have been reduced by statute to the same rule that prevailed at common law in writs of entry, and other possessory actions, and actual seisin or possession need not be proved to maintain them.<sup>7</sup> Where the premises demanded in a writ of right in a case in the State of New York, it was held that an entry need not be proved before action.<sup>8</sup>

346. Wherever it is necessary for the demandant to rely on the

<sup>1</sup> Vin. *supra*.

<sup>2</sup> Dally v. King, 1 H. Bl. 1. Devisees before seisin cannot prosecute a writ of right. Saunders v. Annesley, 2 Scho. & Lefr. 104.

<sup>3</sup> Speed v. Burford, 8 Bibb (Ky.), 57.

<sup>4</sup> Gains v. Conn's Heirs, 2 J. J. Marsh. (Ky.) 104.

<sup>5</sup> Green v. Liter, 8 Cranch (U. S.), 229.

<sup>6</sup> Stearns on Real Actions, 365. Since the revised statutes, the *writ of entry* is the only real action in Massachusetts. See *ante*, § 340.

<sup>7</sup> Lomax, Dig. 618.

<sup>8</sup> Bradstreet v. Clarke, 12 Wend. (N. Y.) 602.

seisin of the ancestor, he must, by tracing the descent of his title as heir, show how he is heir, and a mistake in any of the steps will be a fatal variance. The greatest accuracy seems to have ever been required in England, in the proceedings in writs of right, as they have been not much encouraged by the courts there; and the instances are few in which they have permitted the demandant in a writ of right to amend even for a trivial error.<sup>1</sup> In *Dumsday v. Hughes*,<sup>2</sup> the court thought that writs of right should not be improperly encouraged, and maintained that the "least slip was fatal to the demandant."<sup>3</sup> In a case of a writ of right *ancestral*, in the State of New York, the demandant counted on the seisin of his deceased father, and issue was joined on the mere right. The tenant proved that J. H. was in possession of the premises thirty-eight years ago, and improved them as his own, and continued so in possession fifteen or sixteen years, and died in such possession; that his family remained in possession two or three years afterwards, when his son J. became of age, and took the exclusive possession. From him the possession was regularly transmitted to the tenant. The demandant, on his part, proved that his father was in actual possession fifty-one years ago, and improved the premises as his own; that he died about forty-one years ago, in possession, leaving the demandant, his only son; that the premises were vacant two or three years, until the demandant, by his tenant, took possession of fifty acres by a "possession fence." The term of limitation of an *ancestral* writ, as by the statute of Henry VIII., was *sixty* years. The court considered that the actual possession of the tenant for thirty-eight years was evidence of his right; that this presumption of right was, however, repelled, by the prior possession of the ancestor of the demandant, and it existed thirteen years prior to the tenant's possession, and continued until a descent was cast in favor of the demandant. The assise, therefore, might well have presumed a title in the demandant, since his ancestor was the occupant and apparent owner, fifty-one years ago, and thirteen years prior to the tenant's *tortious* possession.<sup>4</sup>

347. The tenant, in a writ of right, may give in evidence the

<sup>1</sup> Booth on Real Actions, 111, note (a).

<sup>2</sup> 3 Bos. & Pull. 452.

<sup>3</sup> Per Mr. J. Heath, 1 New R. 66.

<sup>4</sup> *Nales v. Peck*, 3 Johns. (N. Y.) Cases, 128. See *Bolling v. Mayor of Petersburg*, 3 Rand. (Va.) 563.

title of a third person, for the purpose of disproving the demandant's seisin, as the writ does not bring into controversy the mere right of the parties to the suit, and by consequence, either party is authorized to establish by evidence, that the other has no right whatever in the demanded premises, or that his mere right is inferior to that set up against him.<sup>1</sup>

348. There is no good reason, it seems, why the demandant in a writ of right should not be allowed to recover according to his interest proved, if less than that which he has demanded.<sup>2</sup> It may be assumed as certain, that, from the time of Lord Hobart, the general doctrine has been, that the demandant in *any* real action is entitled to recover less than he demands in his writ, whether he demands an entirety or an aliquot part, if the variance is not taken advantage of till after verdict.<sup>3</sup>

349. The rule has been in England, that it is not admissible in writs of right or writs of entry to have two counts for the same land; and if the same land is demanded on one count, on the defendant's own seisin, and in another on the seisin of an ancestor or predecessor's, the writ may be abated by plea. In Massachusetts, in any such case, the plaintiff might discontinue as to one of the counts.<sup>4</sup>

350. The statute 32 Henry VIII., as has been already stated, makes a difference in its limitation between a possession commenced against the ancestor, and a possession commenced against the demandant himself; inasmuch as it provides, that "no person shall sue any action for any lands, &c., upon his own seisin above thirty years next before the teste of the original of the same writ to be brought."<sup>5</sup> The demandant, then, will be barred, in case he was disseised, and has omitted to bring his writ of right, within thirty years from the time of such disseisin. And, should this period elapse against the disseisee, and he should die, it would seem to follow, that the bar to him would also be a bar to his heirs.

<sup>1</sup> *Inglis v. Sailors' Snug Harbor*, 8 Peters (U. S.), 138; *Green v. Watkins*, 7 Wheat. (U. S.) 31; *Ten Eyck v. Waterbury*, 7 Cow. (N. Y.) 52; *Poor v. Robinson*, 10 Mass. 181. So also in the English courts, 2 W. Black. 292; Stearns on Real Actions, 227, 228, 372.

<sup>2</sup> Per Thompson J., in *Inglis, &c.*, *supra*; *Dewey v. Brown*, 2 Pick. (Mass.) 52; *Somes v. Skinner*, 3 Ib. 52.

<sup>3</sup> Per Mr. Justice Story, in *Inglis, &c.*, *supra*.

<sup>4</sup> *Overseers of the Poor, &c. v. Otis*, 20 Pick. (Mass.) 38.

<sup>5</sup> See the statute at large in the Appendix.

Otherwise, there would be this absurdity, that the heir making out his title to lands, of which his ancestor had been disseised, by showing the taking of the *esplees*, within sixty years, by the ancestor, would deduce it from one whose right had been wholly barred. For, after thirty years had elapsed in the lifetime of the ancestor, which had given the possessor a title by a negative prescription, the possessor would have his title, which was once good against all the world, overturned by his heir.<sup>1</sup> And yet, most of the writers on the common law have mentioned but one limitation to a writ of right, namely, sixty years; although the statute makes a distinction between a disseisin committed against the ancestor, and against the demandant himself.

351. It may be proper here to remark on the word *predecessor*, which is mentioned in the statute of 32 Henry VIII. That statute provides, that no person shall maintain a writ of right of the possession of his ancestor, or predecessor, but only within sixty years, &c. The distinction between ancestor and predecessor is pointed out in Co. Litt. 78 *b*, and is stated to be, that one is applied to natural persons, and the other to a body corporate. And, in Brook's Reading, 33, it is said that a bishop or parson, making title upon the seisin of their predecessors, are expressly within the words of the statute; and, in the same learned work, an abbot and his predecessors are mentioned in the same manner.<sup>2</sup> These authorities show, that the word *predecessor* was introduced because, if the word *ancestor* had only been used, there would have been nothing to meet the case of a corporation. And hence, a tenant for life is not regarded as a predecessor to the heir. And it seems, that, in a writ of right by the heir, after the determination of a life-estate, the bringing of the writ is to be reckoned from the seisin of the ancestor, and not from the death of the tenant for life; and thus the remedy by writ of right may be lost by the tenancy for life continuing more than sixty years. The heir, however, would still be entitled to his own writ of entry, and might bring his ejectment at any time within twenty years after the tenant's death.<sup>3</sup>

<sup>1</sup> 2 Prest. on Abs. of Tit. 346.

<sup>2</sup> Abbe and his predecessors have been seised of a rent by prescription out of the manor of D., *de tempore*, &c., upon this statute, because they ought to prescribe part in the Abbe and his predecessors, and then show the alteration, and prescribe by the name of Deane and Chapter, &c. Brook's Reading, p. 45.

<sup>3</sup> Widdowson v. Harrington, 1 Jac. & Walk. 512.

352. There is manifestly an incongruity in admitting a claimant to an estate, if he resorts to a writ of right to compel another, who has been in possession for nearly sixty years, to reveal the strength of his own title, when, in the case of an ejectment, which must be brought within twenty years, the possession can only be recovered on the strength of the claimant's title. And it may happen, that much injustice will be done, by compelling a person, who has quietly enjoyed an estate for nearly sixty years, to exhibit evidence, which perhaps is in existence, but not within his power. "The person whose ancestor had been in possession or fifty-nine years and three quarters must begin and expose his own title; and, if the jury were not satisfied with it, very little would do for the demandant, because 'the jury must give the property to somebody.'"<sup>1</sup>

353. Writs of formedon are considered under the following heads; namely, the formedon *descender*, the formedon in *remainder*, and the formedon in *reverter*.

354. Formedon in the *descender* is an action *ancestral droiteurel*, which lies for the issue in tail, upon a violation of that right which descends to him from his ancestor, according to the form of the gift, and is in nature of a writ of right, being the highest writ that an issue in tail can have. This writ lay not at common law, but was given by West. 2, c. 1, the form of which is set forth in the statute; for, at common law, all estates tail were fee-simple conditional; and the donee, by having issue, might have aliened the estate, or forfeited it; in which cases the issue had no remedy. But when, by this statute, which was called *de donis conditionalibus*, the donee was deprived of this power, it was also necessary that the issue should have a remedy against the alienation or discontinuance of his ancestor, and therefore the formedon in descender was given.<sup>2</sup>

355. Formedon in *remainder* lies where a gift is made in tail or for life, remainder in tail or in fee, and the tenant in tail, or for life alienes, or is disseised, and dies without issue; he in remainder, or his representative, may bring their formedon in remainder. This writ, as it lies for him in remainder after an estate tail, is grounded upon the equity of the statute *de donis*; for a formedon

<sup>1</sup> Speech of Mr. Brougham on the Reform of the Law, delivered in the British House of Commons, February 7, 1828.

<sup>2</sup> Bal. on Lim. 7, 8.

in remainder did not lie upon an estate tail at common law, because it was a fee-simple conditional, whereupon no remainder could be limited, on account of the danger of a perpetuity, which was always against the policy of the law.<sup>1</sup>

356. Formedon in *reverter* lies, where the donee in tail, or his issue, dies without issue, and a stranger abates, or they who are seised by force of the entail discontinue the same. In either of these cases, the donor or his heirs may have a formedon in reverter. This writ lay at common law; for though, at common law, the estate tail was a fee-simple conditional, — so that, by having issue, the donee, by alienation, &c., might have barred the possibility of the donor's right of reverter, — yet the having of children was in the nature of the condition precedent; and therefore, if the donee never had a child, the donor might bring his formedon in reverter, and recover against any alienation or disposition of the degree.<sup>2</sup>

357. No notice seems to have been taken (by those who have formerly treated of real actions) of formedon generally. They have merely divided it in the manner which has been mentioned, which is in conformity to the statute of James. A learned author has, however, mentioned formedon generally as the first species of the action of formedon, which lies, as he says, in those cases only, in which the title depends on the gift. This species of writ, it seems, can only be brought in one case, namely, where a person seised in fee-simple, by will, devises his estate in fee-tail; in which case the donee claims by the gift alone, without its working any discontinuance, which it would do, was the gift by a tenant in tail. A donee thus circumstanced, supposing the donor to be disseised before his death, and ousted of the possession, having neither seisin in law nor in fact, but merely a right, can only have recourse to a writ of right, which, we have seen, lies only for a recovery of a fee-simple.<sup>3</sup>

358. By the statute 32 Hen. VIII., it was enacted “that all formedons in reverter, formedons in remainder, and *scire facias*, upon fines of any manors, lands, tenements, or other hereditaments, shall be sued and taken within fifty years next after the

<sup>1</sup> Bac. Abr. tit. Formedon, F. N. 217, 218; Widdowson v. Harrington, 1 Jac. & Walk. 512; Inman v. Barnes, 2 Gall. (Cir. Co.) 815.

<sup>2</sup> Ibid., and Stearns on Real Actions, 821.

<sup>3</sup> 2 Prest. on Abs. of Title, 848.



title and cause of action fallen, and at no time after the said fifty years passed.”<sup>1</sup> The statute, it will be observed, mentions formedons in remainder and reverter, and limits them to fifty years, but omits formedon in descender; and Lord Coke observes, that this act extendeth not to a formedon in descender.<sup>2</sup> The construction of Lord Coke is supported by a case in Dyer, and a case in Bendloe.<sup>3</sup> But, since the statute of 21 Jac. I., this defect of the statute 32 Hen. VIII. became of no consequence.

359. By the statute 21 Jac. I. c. 16, it is enacted “that all writs of formedon in descender, formedon in remainder, and formedon in reverter, of any manors, lands, tenements, or other hereditaments whatever, at any time thereafter to be sued or brought, by occasion or means of any title, or cause thereafter happening, shall be sued or taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years.” It has never been determined, says Mr. Cruise,<sup>4</sup> whether, under this statute, a person claiming an estate tail by descent is barred by the neglect of the preceding person entitled to the estate tail, in not making an entry, or bringing a writ of formedon within twenty years from the time his title accrued. The general opinion, however, is (says the same learned writer), that, in consequence of the words “first descended,” if a person entitled to an estate tail neglects to bring his writ of formedon within twenty years after his title first descends, he, and also his issue, will be barred. For, if the issue brings a formedon, it may be answered, that the title first descended to his predecessor upwards of twenty years before. This construction is confirmed by the opinion of the majority of the judges in a case in Plowden,<sup>5</sup> in which two of the judges said, that, if a tenant in tail was disseised, and the disseisor levied a fine, and five years passed, and afterwards the tenant in tail died, the issue in tail should have a new period of five years to make his claim; for a new right came to every one of them, *per formam doni*. The words of the statute of fines (4 Hen. VII.), upon which this opinion of the majority of the judges was founded, are nearly similar to those of the statute of 21 Jac. I.; and therefore, continues Mr. Cruise, it may fairly be presumed, that the judges would adopt this reasoning,

<sup>1</sup> 8 Dyer, 278.

<sup>2</sup> 8 Dyer, 278; Bendloe, 194.

<sup>3</sup> Stowell v. Zouch, Plowd. 874.

<sup>4</sup> Co. Litt. 115.

<sup>5</sup> 8 Cruise, 1, Dig. 84.

and give the same effect to the words "first descended," in the statute 21 Jac. I., as in the statute of fines. Chief Justice Abbott observes, that the several statutes of limitation, being all *in pari materia*, ought to receive a uniform construction, notwithstanding any slight variation of phrase, for their object and intention is the same.<sup>1</sup> But, besides these authorities, the Court of Common Pleas in England have expressly determined, that the twenty years, within which a formedon in the descender ought to be brought, begins to run when the title descends to the first heir in tail, unless he labors under disability.<sup>2</sup>

360. In this country, it seems also to be well established, that, under the statute of 21 Jac. I., and other statutes containing similar provisions, a person claiming an estate tail by descent is barred by the neglect of the preceding person entitled to the estate, in not making an entry, or resorting to a writ of formedon, within twenty years from the time his title accrued. In an action of formedon in descender, in Massachusetts,<sup>3</sup> sued by the demandant as heir in tail, in opening the pleadings, it was admitted by the parties, that the tenant in the common recovery had afterwards, but more than forty years since, discontinued the estate tail by his conveyance, admitting the recovery to be void; and that, on his death, the heir in tail, on whom the right descended, was of full age, and not without any of the savings in the limitation of actions of formedon. The court thereupon observed, that this objection was fatal. But the counsel for the demandant urged, that each successive heir in tail was entitled to bring his action of formedon, at any time within twenty years after his right accrued. The court denied this position to be law, and said, that it had been formerly determined, in the case of *Hart v. Hart*, in Middlesex, that when the statute of limitations had once begun to run against the heir in tail, no subsequent disability could interrupt its progress; and, after it ran twenty years, no formedon could afterwards be maintained. The demandant, therefore, moved for and had leave to discontinue. And, in the Circuit Court of the United States, Mr. Justice Story said, he took it to be well settled, that, if the time limited has once begun to run against any tenant in tail, it is a good bar, not only

<sup>1</sup> *Murray v. East India Co.*, 5 B. & A. 215.

<sup>2</sup> *Tolson v. Kay*, 8 Brod. & Bing. 217. [*Cannon v. Rimington*, 10 Eng. L. & Eq. 477.]

<sup>3</sup> *Dow v. Warren*, 6 Mass. 828.

against him, but also against all persons claiming in the descent, *per formam doni*, through him.<sup>1</sup>

361. The word *fallen*, in the statute, is clearly applicable to remainders and reversions. And it is always held that writs of formedon in remainder and reverter may be brought at any time within twenty years after the determination of the preceding estate tail, though such preceding estate tail should have continued for centuries, because, by such determination, the title and action first descended and fell.<sup>2</sup>

362. A *writ of entry*, at common law, is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered, or continues in possession.<sup>3</sup> A writ of entry, *sur disseisin*, may be brought, not only against the party who committed the disseisin, but against all those who come into the disseisin under him.<sup>4</sup> When it is brought against the disseisor, by the disseisee, it has been denominated a writ of entry in the nature of an assise, because it may be brought instead of an assise.<sup>5</sup> The remedy by assise is only applicable to two species of injury by ouster; namely, abatement, and a recent or novel disseisin.<sup>6</sup>

<sup>1</sup> *Inman v. Barnes*, 2 Gall. (Cir. Co.) 315.

<sup>2</sup> *Ibid.*; 3 Cruise, Dig. 488.

<sup>3</sup> 8 Black. Com. 181.

<sup>4</sup> Co. Litt. 288; Stearns on Real Actions, 148.

<sup>5</sup> Stearns on Real Actions, 145.

<sup>6</sup> If the abatement happened on the death of the demandant's father or mother, brother or sister, uncle or aunt, nephew or niece, it was called an assise of *mort d'ancestor*. If the abatement happened on the death of a more remote ancestor of the demandant, the remedy was by writ of *ayle* or *de avo*; and, so in a more remote degree, by writs taking their name from the degree of relationship. Mr. Justice Blackstone observes, since it was formerly always held to be law that, where lands were devisable in a man's last will by the custom of the place, an assise of *mort d'ancestor*, as the right of possession could never be determined by a process which only required these two points, — the seisin of the ancestor and the heirship of the demandant; and now, since the statute of wills, 32 Hen. VIII., makes all socage lands devisable, that the statute 12 Car. II. has converted all tenures, a few only excepted, into free and common socage, — no assise of *mort d'ancestor* can, at the present day, be brought. 3 Bl. Com. 187. An assise of novel disseisin differs from the last, in that it recites a complaint by the demandant of the disseisin committed, in terms of direct averment; whereupon the sheriff is commanded to reseize the land, and all the chattels thereon, and keep the same in his custody until the arrival of the justices of assise; and, in the mean time, to summon a jury to view the premises, and to make a recognition of the assise before the justices, at which time the tenant may plead either the general issues *nul tort*, *nul disseisin*, or any special pleas; and if, upon the general issue, the recognitors find an actual seisin in the demandant, and his subsequent disseisin by the tenant, he shall have judgment to recover his seisin, and the damages for the injury sustained. 3 Bl. Com. 188; Booth, 211.

363. The writ of entry *sur abatement* must necessarily be grounded on the seisin of the ancestor; and, therefore, by the statute Hen. VIII., fifty years is the period within which a writ of entry *sur abatement* must be brought. But it does not seem, says a learned writer, to have ever been supposed, that the disseisin was to the heir, so as to bar him, unless he should bring his action within thirty years; which latter period is the time limited, by the statute Hen. VIII., for all writs grounded upon the possession of the demandant himself.<sup>1</sup>

364. As to writs of entry *sur intrusion*, thirty or fifty years is, by the statute of Hen. VIII., the period of limitation, according to the circumstances of the case; that is, it depends upon whether the possession is sought upon the dispossession of the ancestor, or the dispossession of the demandant himself.<sup>2</sup> This writ lies against those who enter upon the estate, before the reversioner, upon the death of any tenant for life. And the reversioner, after a life-estate is determined, must count upon an actual seisin, by the person creating the life-estate taking the esplees; and the fifty years is reckoned from that seisin, and not from the death of tenant for life, or the commencement of the adverse possession. The consequence is, that this remedy may sometimes fail when an ejectment will lie. For, if the tenant for life should live more than fifty years, there will be a lapse of more than the specified time from the actual seisin, and therefore the reversioner cannot pursue this mode of action, even immediately after the death of tenant for life. And, if he should not avail himself of his right of entry for twenty years from the death of tenant for life, he will be barred of all remedy.<sup>3</sup>

365. In Massachusetts and in Maine, by the revised statutes of those States, the demandant in a writ of entry must declare on his own seisin, within twenty years then last past, without specifying any particular day, and must allege a disseisin by the tenant, but need not aver a taking of the profits. The demandant is not required to prove an actual entry under his title; but, if he is entitled to such an estate as he claims in the premises, whether as heir or devisee, purchaser or otherwise, and also that he has a right of entry therein, it shall be sufficient proof of his seisin.<sup>4</sup>

<sup>1</sup> Preston on Abstracts of Tit. 845.

<sup>2</sup> Ibid.

<sup>3</sup> Widdowson v. Harrington, 1 Jac. & Walk. 512.

<sup>4</sup> For the particulars of the proceedings in a writ of entry in Massachusetts, see Mass. Rev. Stat. c. 101, part 3, tit. 8; Maine Rev. Stat. c. 145, tit. 10. This remedy,

366. Though the action of *ejectment* is not generally mentioned, *eo nomine*, in a statute of limitations, yet it is provided that none shall make an entry, but within a certain time after their right or title shall first descend or accrue. And as the right of entry is taken away after the time limited has elapsed, of course no ejectment can be sustained which depends upon the right of entry; as will be more fully explained in the following chapter.

367. The writ of dower *unde nihil habet* is a real action, which lies for a widow claiming the specific recovery of her dower, no part having been assigned to her. There is another writ, called the writ of right of dower, seldom used in practice, which is applicable to the particular case where the widow has received a part of her dower.<sup>1</sup> In writs of dower, the demand is of the demandant's "reasonable dower, which falleth to her *of the freehold*, which was of A, her late husband in C, whereof she hath nothing;"<sup>2</sup> the plaint or count being less general, and specifying the particulars of the demand, as a messuage, ten acres of land, &c.<sup>3</sup> In all other sorts of real writs, the writ itself is as special as the count.<sup>4</sup> Dower is not within the statutes of limitation of Henry or of James, but a fine levied by the husband or his alienee or heir will bar her by the force of the statute of non-claims, unless she bring her action within five years after the accruing of her title, and the removal of her disabilities, if any.<sup>5</sup> In New Hampshire,<sup>6</sup> in Geor-

as has been explained, was deemed by the commissioners one more simple, convenient, and effectual than that by ejectment, because a final judgment in a writ of entry is a bar to another action of the same kind. See *ante*.

<sup>1</sup> Booth on Real Actions, 166. Dower may be recovered by bill in equity as well as by action at law. The jurisdiction of chancery is concurrent with that of law; and, when the legal title to dower is in controversy, it must be settled at law; but if that be admitted or settled, adequate relief can be granted to the widow in equity, both as to the assignment of the dower and the damages. The equity jurisdiction has been equally entertained in this country and in England. 4 Kent's Com. 71, 72. Courts of probate are also empowered in many of the States, upon the application of the widow or of the heirs, to appoint commissioners to set off the widow's dower, which has in a great measure superseded the common-law remedy by action.

<sup>2</sup> Booth on Real Actions, 166; Fitz. N. B. 147.

<sup>3</sup> 2 Saund. 43.

<sup>4</sup> See opinion of Story, J., in *Inglis v. Sailor's Snug Harbor*, 8 Peters (U. S.), 188.

<sup>5</sup> Park on Dower, 311, 4 Kent's Com. 69. "A woman brought a writ of dower of the seisin of her husband sixty-one years past, the action lyeth, *because that is not of her owne seisin, nor of none of her ancestors, nor predecessors, neither is it an action possessorie, and it is not prohibited by the statute.*" Brooke's Reading upon the Stat. 32 Hen. VIII. cap. 2.

<sup>6</sup> *Barnard v. Edwards*, 4 N. H. 107.

gia,<sup>1</sup> in North Carolina,<sup>2</sup> and in Tennessee,<sup>3</sup> the writ is not within the statute of limitations;<sup>4</sup> and in Maryland,<sup>5</sup> it has been held, that the statute of limitations is no bar in equity to the claim of dower. The principle of the doctrine is stated clearly by the court in the case in New Hampshire. The view taken by the court was, that the statute applied only to actions, entries, and claims, founded upon a previous seisin or possession of the lands demanded, from which seisin or possession the time of limitation may be dated; and that dower cannot have a limitation dated from the seisin of the husband; and that a limitation cannot be dated from the seisin or possession of the widow, because she cannot have either, until dower has been assigned to her.<sup>6</sup> This doctrine was recognized and approved by the Supreme Court of Massachusetts, in a case wherein it was decided that a writ of dower was not barred by the revised statutes of that State; and the court say that the limitation being thus dated from the seisin, it would be absurd to extend it to actions in which seisin, not being issuable, can never become the subject of evidence on trial.<sup>7</sup> By the modern English statute of limitations of 3 and 4 Will. IV. c. 27, no suit for dower shall be brought, unless within twenty years after the death of the husband; and that an account of the rents and profits of the dowable lands shall be limited to six years.<sup>8</sup> In New York the writ of dower is abolished, and the action of ejectment substituted.<sup>9</sup> In New Jersey,<sup>10</sup> an action of dower is barred after twenty years, and in Ohio,<sup>11</sup> after twenty-one years. The limitations to actions of ejectment for dower, created by the revised statutes of New York, requiring

<sup>1</sup> Dud. 123.

<sup>2</sup> *Spencer v. Weston*, 1 Dev. & Bat. (N. C.) 213.

<sup>3</sup> *Guthrie v. Owen*, 10 Yerg. (Tenn.) 389.

<sup>4</sup> [So in Michigan. *May v. Rumney*, 1 Mann. (Mich.) 1. And in Delaware. *Bordley v. Clayton*, 8 Harr. 154. And Alabama. *Owen v. Campbell*, 32 Ala. 521.]

<sup>5</sup> *Wells v. Beall*, 2 G. & Johns. (Md.) 468.

<sup>6</sup> *Barnard v. Edwards*, 4 N. H. 107. And see *Moore v. Frost*, 3 Ib. 126.

<sup>7</sup> *Parker v. Obear*, 7 Met. (Mass.) 24. Dower is maintainable in Pennsylvania, for the wife's third in land, held by a person claiming by title adverse to his heirs, but supposed to have been the estate of the husband. *Galbraith v. Green*, 13 S. & Rawle, 85. See also case of Dille Vaughn's estate, 4 Whart. 177. So in Maine, an adverse possession of the premises in which dower is claimed, for more than twenty years during the life of the husband, it was held, will not bar the rights of the widow. *Durham v. Angier*, 2 App. (Me.) 242. An ejectment will not lie for dower before assignment. Steph. N. P. 1391; Keb. 181. •

<sup>8</sup> See Appendix, p. xvi.

<sup>9</sup> 4 Kent's Com. 70 (note).

<sup>10</sup> *Berrion v. Conover*, 1 Harr. (N. J.) 107. [*Conover v. Wright*, 2 Halst. 613.]

<sup>11</sup> *Tuttle v. Wilson*, 10 Ohio, 24.

a woman to demand her dower within twenty years after the death of the husband, does not apply where the husband died previously to those statutes going into effect.<sup>1</sup> The course of decisions in South Carolina has been to date the running of the statute, not from the accrual of *the right*, but from the accrual of the *right of action* for its assertion, so that the statute does not begin to run until there is a possession in some one adverse to the claimant of dower.<sup>2</sup> In North Carolina, the claim which a widow has for dower in the lands of which her husband died seised, not being before assignment, "a right or title" to the land is not barred by the act of 1715.<sup>3</sup> In Maryland, a widow cannot recover damages against the alienee of her husband from his death, but only from the time of demand and refusal to pay her for, or assign her dower; the feoffee is not in default until that time. This rule prevails at law and in equity.<sup>4</sup>

<sup>1</sup> Sayre v. Wisner, 8 Wend. (N. Y.) 661.

<sup>2</sup> Richard v. Talbird, Rice (S. C.), Eq. 158.

<sup>3</sup> Rev. Stat. c. 65, § 1; Spencer v. Weston, 1 Dev. & Bat. (N. C.) 213.

<sup>4</sup> Steiger's Adm'r v. Hillen, 5 G. & Johns. (Md.) 121. [But, though the statute does not apply to the wife's remedy by action for her dower, it seems that lapse of time will bar an action for an account. Kiddall v. Trimble, 1 Md. Ch. Dec. 148. In Mississippi, the action of dower is barred by the statute. Torrey v. Minor, 1 S. & M. (Miss.) Ch. 489. So in South Carolina. Caston v. Caston, 1 Rich. (S. C.) Eq. 1. And in Iowa. 6 Clarke, 106.]



## CHAPTER XXX.

## OF THE ACTION OF EJECTMENT AND THE RIGHT OF ENTRY.

368. THE history of the action of ejectment is in a degree illustrative of the times through which it has descended, and demonstrative of the truth, that, in a progressive state of society, municipal law will infallibly, though almost silently and imperceptibly, shape itself to the ends of justice. In the earlier periods of the English law, the right to the possession of, or property in, lands, was determined by some kind of real action suited to the circumstances of the case; but, for a long time, a tenant for years had no means of recovering possession if ousted of his term, — a lease for a term of years being only regarded as a contract or covenant, upon which, if ejected by a stranger, he could recover only damages, and if by his lessor, his term and damages, by a writ of covenant.<sup>1</sup> An alteration in the law took place in the reign of Edward IV., and the termor was allowed to recover both his term and damages; and, at length, in the reign of Elizabeth, the *ejectione firmæ* became the established form of action for the trial of titles to land. In this action, there was no fiction; the plaintiff was a real person, to whom a lease was actually sealed by the claimant upon the land; and so also was the defendant, who entered and ousted the plaintiff. This gave rise to abuse, to prevent which, a rule of court was made, prohibiting the plaintiff in ejectment from proceeding against the defendant, without previously giving notice to the person actually in the possession of the lands, who then had liberty from the court to defend the action, on an undertaking to indemnify the defendant, in whose name the action proceeded. When this rule was made is not certain. A still further improved mode of proceeding was introduced, as is said, by Rolle, Ch. J., who presided in the higher law court during the Protectorate: the plaintiff and defendant were no longer real persons, but the tenant in possession of the land was allowed to become defendant, as entering into a rule to

<sup>1</sup> 8 Bla. Com. 158, 200.

confess the lease to the fictitious claimant, his entry into the land, and his ouster by the fictitious defendant, or, as he was called, the "casual ejector;" and the subsequent proceedings were then carried on in the name of the real tenant.<sup>1</sup> The action, according to Lord Mansfield, is the creature of Westminster Hall, introduced within the time of memory, and moulded gradually into a course of practice by rules of the courts.<sup>2</sup> It is a *real* remedy in respect to the land, and *personal* in respect of the damages and costs. Hence it is called a *mixed* action, in which a lessee for years, when ousted, can recover his term, as also his damages. It is also a possessory action, and only maintainable where the lessor of the plaintiff may enter.<sup>3</sup> The action of ejectment is the action by far the most in use in this country, and even in those States, as the reports show, wherein real actions still remain in force as the heritage of the old English common law.<sup>4</sup> In some of the States, it is said, it is retained with its fictions, and in others without. In Pennsylvania, South Carolina, Missouri, Arkansas, its fictions form no part of the practice,<sup>5</sup> and so in Rhode Island. It has been stated, that, in all the States, the proceedings in the action are accommodated to circumstances, and to the views entertained in each as to convenience.<sup>6</sup>

369. Although the action is not, *eo nomine*, included in the act of limitations, yet, inasmuch if it be enacted that none shall make

<sup>1</sup> Rosc. on Real Actions, and Runn. on Eject.; Robinson v. Campbell, 3 Wheat. (U. S.) 212. In the Colony of Massachusetts, before judicial proceedings had assumed a regular and systematic form, the *fictitious* action of ejectment had become established in the English courts; but the fictions were intelligible only to lawyers, and were not of a nature to be approved by the Massachusetts Puritans. Stearns, in his Real Actions, says: "We should hardly expect them to resort to the indirect method of *making a lease* of their lands, in order to try the title. And, as to *confessing a lease*, an *entry*, and an *ouster*, which had never had any existence in fact, they seem—as we should naturally expect—to have regarded it as a *violation of truth*, and therefore wholly inadmissible. It is doubtless to these circumstances that there are only two cases to be found, upon the records of our courts, of the fictitious action of ejectment upon the English model." Stearns, *supra*, 896 (note).

<sup>2</sup> Per Lord Mansfield, in Fairclaim v. Shamtitle, 8 Burr. 1292.

<sup>3</sup> Bac. Abr. Eject. (A.) 2; 2 Steph. N. P. 1874. In ejectment, under Stat. of 1 Geo. IV., c. 87, § 2, the landlord can recover the mesne profits of the premises from the expiration of the tenant's interest down to the time of the verdict, or some other prior day, to be specially mentioned therein. But trespass must be resorted to for the subsequent profits. Bac. Abr. Eject. (A.) 2.

<sup>4</sup> A number of cases for the recovery of land in Maryland are reported in the fourth volume of Har. & McHen., before the Revolution, which are all actions of ejectment.

<sup>5</sup> 4 Kent's Com. 71 (note).

<sup>6</sup> Stearns's Real Act. 57.

an entry but within a certain declared period of time after the right or title shall first descend or accrue, and inasmuch as that right is taken away by the lapse of the prescribed period, the consequence is, that no action of ejectment (the privilege of bringing which is wholly dependent on the right of entry) can be sustained. Indeed, the right of entry and the right to maintain ejectment are so much alike, in legal sense, that one may be used in that sense for the other. This has long so been held under the statute of James, and may be regarded as the settled construction in this country.<sup>1</sup> Therefore, to determine whether or not the party is barred of his right to maintain an action of ejectment, it is requisite to determine *when* his right of entry accrued.

370. It has been commonly said, that a possession for *sixty* years creates a complete title against anybody; and, indeed, it is so laid down by Blackstone.<sup>2</sup> The annotator to that author (Christian) points out wherein it is not universally true; for an uninterrupted possession for sixty years will not create a title, where the claimant or demandant had no right *to enter* within that time. An estate for life or years may continue for upwards of sixty years, and yet the reversioner may prosecute his right of entry by an ejectment. As the remedy only, and not the right, is barred by the statute, it is possible that an estate may be enjoyed adversely for even centuries, and may at last be recovered by virtue of the right of entry. Suppose an estate to be limited to one in tail, with remainder over to another in fee, and the tenant in tail to be barred of his remedy by the statute; inasmuch as his *estate* subsists, the right of entry in the remainder-man cannot accrue until the failure of the issue of the tenant in tail, which may not happen for very many years. In *Atkyns v. Horde*, an estate was settled upon several persons successively in tail, remainder to A in fee; and

<sup>1</sup> *Henderson v. Griffin*, 5 Peters (U. S.), 158. And see also *Bradstreet v. Huntington*, Ib. 40; *Miller v. McIntyre*, 6 Ib. 61. [In Tennessee, a title is not barred by a mere failure to sue during the time limited; but there must have been an adverse possession. *Neddy v. State*, 8 Yerg. (Tenn.) 249; *Smith v. McCall*, 2 Humph. (Tenn.) 168. A sheriff's deed of land sold on execution relates back to the date of the levy, and invests the purchaser with the right of entry from the time of the sale. He acquires by his purchase not merely an equity, but an inchoate legal title; and the statute of limitations begins to run against his right of entry from the time of the sale, and not from the date of the deed. *Chalfin v. Malone*, 9 B. Mon. (Ky.) 596. The doctrine of entry by relation applies only to the case of disseisor and disseisee. *Litchfield v. Ready*, 1 Eng. L. & Eq. 460.]

<sup>2</sup> 8 Bl. Com. 196.

one of the remainder-men in tail, being out of possession, brought an ejectment, which was held to be barred; and the heir at law of A, after all the tenants in tail had died without issue, brought an ejectment within the time limited for the right of entry, from the time his remainder fell into possession, and he recovered the estate.<sup>1</sup> No entry can be made by persons entitled to reversions in fee-simple expectant on the determination of an estate tail, or to estates tail in remainder, during the continuance of the particular estate which will have the effect of avoiding the statute.<sup>2</sup> It has been held, in Pennsylvania, that, notwithstanding the next heir in tail releases to the tenant in tail in possession, the statute does not run against the releasor, until the death of the tenant in tail without issue.<sup>3</sup>

371. The right of entry in the person in remainder can in no case be affected by the statute of limitations during the existence of the particular estate; and the *laches* of a tenant for life will not, as a general rule, affect the party entitled.<sup>4</sup> It was decided, in *Goodright v. Forester*, in which the judgment of the court was delivered by Lord Ellenborough,<sup>5</sup> that the fine of a tenant for life divests the estate of the remainder-man or reversioner, leaving him only a right of entry, to be exercised either then, by reason of forfeiture, or within five years after the *natural determination* of the preceding estate; and that the effect of the statute, 4 Hen. VII. c. 24, is only to save to all the remainder-men their respective rights of entry within five years after their respective titles accrue, without a subsequent remainder-man being prejudiced by the *laches* of another remainder-man who preceded him. The same doctrine was declared by the Supreme Court of New York, in a case in which it was held, that the right of entry of the lessor could not exist during the estate by the curtesy.<sup>6</sup>

<sup>1</sup> *Atkyns v. Horde*, 1 Burr. 60; Thomas Coke, Litt. 252, n. U. [And see *ante*, § 804.]

<sup>2</sup> 8 Cruise, Dig. 408; *Cook v. Danvers*, 7 East, 299; *Dorsey v. Smith*, 7 H. & Johns. (Md.) 845.

<sup>3</sup> *Hall v. Vandegift*, 8 Binn. (Penn.) 874. And see *Cheseldine v. Brewer*, 4 Harr. & McHen. (Md.) 487.

<sup>4</sup> 8 Cruise, Dig. 408; 2 Stark. on Ev. 887.

<sup>5</sup> *Goodright v. Forester*, 8 East, 551. And see also *Chandler v. Cook*, 1 Root (Conn.), 546; *Dorsey v. Smith*, 7 H. & Johns. (Md.) 845; *Widdowson v. Harrington*, 1 Jac. & Walk. 512; *Colclough v. Hulse*, 8 B. & Cress. 757; *Milner v. Brightman*, 10 East, 588.

<sup>6</sup> *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 890. Also in *Jackson v. Sellick*, 8 Ib. 202.

If a husband seised, as tenant by the curtesy, makes a conveyance in fee, and the grantee enters and continues in possession, claiming to own the whole absolutely, such possession will be regarded as adverse to the wife and those claiming under her, only from the period of the husband's death.<sup>1</sup> Where the wife became entitled to the premises as heir at law, during her coverture, and her husband conveyed his life-estate therein, and his grantee continued in possession for more than thirty years, the husband still living, she may, after the decease of her husband, make an entry, and recover the land.<sup>2</sup> Where a husband, by deed in his own name, only conveys his wife's land in fee, and she merely affixes her signature and seal to the deed "in token of her relinquishment of all her right in the bargained premises," her right in fee is not thereby conveyed, and she, after the decease of her husband, may maintain a writ of entry on her own seisin, to recover the land.<sup>3</sup> The principle in reference to which the statute of limitations operates in Kentucky is, that there must be a right

<sup>1</sup> *Constantine v. Van Winkle* (N. Y. Court of Errors, per Porter, Senator), 6 Hill (N. Y.), 177. In the case of *Jackson v. Jackson* (*ex dem.* Swartwout), Savage, Ch. J., said: "At what period of time, I would ask, was it in the power of the heirs of Mrs. Cooper to have asserted their rights, before 1817, when Thomas Cooper (he was tenant by the curtesy) died?" He answers: "They were not bound to make an entry or claim until the death of Mrs. Cooper. And, from that period till the death of tenant for life, the law would not permit them to enter. Shall *laches*, then, be imputed to them? Certainly not. Whether Colden Cooper was born before or after the disseisin, seems to me not to change the rights of the parties. The lessors of the plaintiff have brought their action within ten years after the operation of the statute upon their claim, and are not barred by it." Sutherland, J., in the same case, gave a similar opinion. 5 Cowen (N. Y.), 95, 103. Held, in Kentucky, that, where the husband alienes the wife's land, the wife's right of entry is not barred until twenty years after the husband's death. *Miller v. Shackelford*, 3 Dana (Ky.), 289. [*Merraman v. Caldwell*, 8 B. Mon. (Ky.) 82.]

<sup>2</sup> *Mellus v. Snowman*, 8 Shep. (Me.) 201. But, if the demandant and her husband had been disseised during the coverture, they would have had a right to enter immediately upon the disseisor, and from that time the statute would have commenced running against the husband, and against the wife. *Ibid.* [*Guion v. Anderson*, 8 Humph. (Tenn.) 298.]

<sup>3</sup> *Bruce v. Wood*, 1 Met. (Mass.) 542. The statute 32 Hen. VIII., c. 28, which provides, that no act by the husband only shall make any discontinuance of the wife's inheritance or freehold, but that she, her heirs, &c., may lawfully enter thereupon, according to their rights, is in force as a part of the common law of Massachusetts. *Ibid.* [*Fagan v. Walker*, 5 Ired. (N. C.) 687. In Vermont, land devised to a woman in tail was conveyed by deed of herself and her husband, and a suit commenced by the children of the *feme* within fifteen years after the death of both husband and wife was held to be barred. *Giddings v. Smith*, 15 Vt. 844.]

of entry existing at the time of the bar, which can be affected; and, when the person who is supposed to be affected, and those under whom he holds, had no right of entry, that right is not tolled.<sup>1</sup>

372. Neither the statute of limitations, nor a descent cast, will affect a right, if a particular estate existed at the time of the disseisin.<sup>2</sup> Thus, where the plaintiff demanded, as a reversioner, a portion of a certain tract of land, and proved that his grandfather, in 1770, was seised of the premises in fee, and died so seised; and whereupon his estate was divided among his heirs; and, upon such division, the premises in question were assigned to his widow as her dower, and she entered and took possession; that the said widow died in 1810; and that the plaintiff, in 1811, entered into the demanded premises, and took possession of the same, — the tenant proved, that his grandfather entered upon the premises nearly forty years since, and that, for more than thirty years before the plaintiff's entry, the tenant's said grandfather, his father, and he the said tenant, had been in the quiet possession of the same, claiming to hold it in their own right; and, upon this evidence, the tenant contended, that, by virtue of such possession, the plaintiff, in 1811, had no right of entry; and, by Parker, Ch. J., "The demandant's right of entry accrued on the death of the tenant for life; and he had twenty years, by the statute, to preserve his estate by entry. He entered, in fact, within one year after his title accrued; that is, after the termination of the life-estate."<sup>3</sup>

<sup>1</sup> Per Mills, J., in *May's Heirs v. Hill*, 5 Litt. (Ky.) 813. [*Gill v. Fauntleroy*, 8 B. Mon. (Ky.) 177; *Vanarsdall v. Fauntleroy*, 7 Ib. 401. But where the purchasers held undisturbed possession for twenty-three years after the wife's death, and eighteen after the husband's, and it did not appear that the heirs labored under any disability during the time, it was held that they were barred. *Patrick v. Chenault*, 6 B. Mon. (Ky.) 815.]

<sup>2</sup> Per Kent, Ch. J., in *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; *Cook v. Danvers*, 7 East, 299.

<sup>3</sup> *Wallingford v. Hearl*, 15 Mass. 471. And see also *Wells v. Prince*, 9 Ib. 508; *Jackson v. Sellick*, 8 Johns. (N. Y.) 262; *Jackson v. Johnson*, 5 Cowen (N. Y.), 74. A descent cast does not prevent the bringing of an ejectment, though no entry has been made by the plaintiff. *Mockbee v. Clagett*, 2 Harr. & McHen. (Md.) 1. The opinion of the commissioners on the law of real property, in England, was, that a discontinuance, or descent cast, or any other impediment by which a right of entry may be now barred, should *not* operate against the title to an estate in possession, so as to take away the right of entry. "A descent," say they, "arises from the act of God, and not of the parties." Report of Com. Accordingly, by the statute of 3 and 4 Will. IV., c. 27, no descent cast or discontinuance defeats any right of entry.



But, where a widow, tenant for life of land settled upon her for jointure (such settlement being made in execution of a power granted to the deceased husband), married, and, after her death, the second husband held for more than twenty years after her death, the possession of the second husband, after the wife's death, it was held, was a bar to an action of ejectment, brought by the party on whom the reversion in fee had descended during the estate for life.<sup>1</sup>

373. In the statute of descents in Connecticut, the word "children" is substituted for "lawful issue," and other technical words of the common law. Therefore, where A, being seised of land, had an illegitimate child C, and afterwards intermarried with B, by whom she had a legitimate child D: A died in 1778, B surviving her; D went into possession of the land, and ever since held adversely; B died in 1815, C being then and ever since a feme covert; in ejectment, brought by C and her husband, in 1821, for a moiety of the land, it was held that B had an estate for life, as tenant by the curtesy; that C had no right of entry until the death of B; that C, therefore, was not barred of her right by the possession of D, and the plaintiff was entitled to recover.<sup>2</sup>

374. The rule is the same where a person is seised of a reversion expectant for a *term of years*; and the person so seised is not bound, in order to entitle himself to recover in ejectment, to show, as a part of his case, that he has actually received at any time the rents reserved upon the lease for years. If ejectment be brought within the time prescribed for the right of entry, the statute is satisfied as regards the term, though, as to the rent which has become due, it may be different.<sup>3</sup>

375. Where there exist two separate rights of entry, the loss of one by lapse of time will not impair the other. And, if a person acquires a second right, he is allowed a new period of twenty years to pursue his remedy, though he has entirely neglected the first. The maxim of the law is, "*Quando dua jura in una persona con-*

<sup>1</sup> *Parker v. Gregory*, 2 Adol. & Ell. 14; and 29 Eng. Com. Law, 14.

<sup>2</sup> *Heath v. White*, 5 Conn. 228.

<sup>3</sup> *Orrell v. Maddox*, Runn. on Eject.; App. to the same, No. 1. And see *post*, Ch. XXXIII., on the subject of Possession as between Landlord and Tenant. It has been held, that a lessor is within the section of the act of 8 and 4 Wm. IV., which provides expressly that the statute runs from the time when remainders or reversions become estates in possession, when the rent has not been received adversely. 7 Mees. & Welsb. (Ex.) 131.



currunt, æquum est ac si essent in diversis.”<sup>1</sup> A tenant in tail of lands, held in ancient demesne, confined them by fine, in the court of ancient demesne, to three persons for their lives; he afterwards levied another fine of the reversion, in the same court, to the use of himself and his heirs. It was determined, that the first fine created a discontinuance of the estate, and took away the entry of the issue in tail, during the lives of the three persons to whom the fine was levied, but that the second fine did not make any discontinuance; therefore, although the issue in tail had neglected to bring his formedon within twenty years after the death of his ancestor, when his right first accrued, yet, when the last life dropped, the discontinuance was determined, and the heir acquired a new right of entry, for the pursuit of which he was allowed, by the statute 21 Jac. I., a new period of twenty years. And that, when a person has a right, and several remedies, the discharge of one is not the discharge of the other; and that the word *right*, in the statute, means a right of entry. This judgment was afterwards affirmed in the House of Lords.<sup>2</sup> So, a remainder-man expectant on an estate for life or years, to whom a right to enter is given by the forfeiture of the tenant for life or years, is not bound to do so. And if the right to enter is barred for that cause by the statute, it does not affect the right of entry arising afterwards, on the death of the tenant for life.<sup>3</sup> So, where the defence was, that, as a devisee for life had never entered, and as a refusal to accept the devise was therefore to be presumed, the right of the remainder-man to enter having thus accrued, he was bound to enter within twenty years. The court said, it was true, that the remainder-man might have entered immediately on the refusal of the devisee, but that one might have different rights of entry; and although the devisee for life refuses to accept the estate devised, and the remainder-man thereby acquires an immediate right of entry, yet he is not obliged to avail himself of his right so accruing, but may enter, after his second right accrues, by the death of the tenant for life.<sup>4</sup> To these

<sup>1</sup> 2 Cruise, Dig. 498.

<sup>2</sup> Hunt v. Bourne, 1 Salk. 339; 2 Ib. 421; Bro. Parl. Cas. 66. And see Goodright v. Forester, 8 East, 551.

<sup>3</sup> 2 Cruise, Dig. 501; Stevens v. Winship, 1 Pick. (Mass.) 318; Gwynn v. Jones, 2 Gill. & Johns. (Md.) 173. [Miller v. Ewing, 6 Cush. (Mass.) 84; Woodson v. Smith, 1 Head (Tenn.), 276; Bell v. McCawley, 29 Ga. 355; Gibson v. Jayne, 37 Miss. (8 George) 165; Salmons v. Davis, 29 Mo. (8 Jones) 176.]

<sup>4</sup> Wells v. Prince, 9 Mass. 508. By the statute of 8 and 4 Will. IV. (see App. vi.)

cases, showing that the remainder-man need not insist on the forfeiture of the estate for life, but may wait the regular expiration of the particular estate, and the statute does not begin to run till that time,<sup>1</sup> the following case was held to be analogous: A was tenant for life, with a power of appointment by will, attested by three credible witnesses. By will, attested by three witnesses, he appointed the lands to B for life, and after her death to C in fee. B was one of the witnesses to the will, and the appointment to her was therefore void. On the death of the testator, the husband of B entered, and held the land till his death, which was three years after the death of B. The statute, it was held, did not begin to run against C till the death of B, notwithstanding the life-estate was bad.<sup>2</sup>

376. It has been expressly held, that, where the person who is made tenant for life has been absent *seven* years (though, in common cases, the presumption of law is that he is dead), yet, as there is no legal presumption as to the *time* of his death, a party, who claims as a reversioner cannot avail himself of this presumption to establish that the tenant for life died within twenty years from the commencement of the action; but he must prove, by direct evidence, that he did die within that time.<sup>3</sup> The length of time may, however, be so great as to preclude the necessity of di-

sections 3 and 4, reversioners and remainder-men have two periods prescribed, when they may enforce their claim: 1st, when a forfeiture takes place, or, 2d, at the time when the reversion becomes an estate in possession; and, by section 6, of the same statute, the statute continues to run, notwithstanding the death of the party, and *there has been no administrator*, which is different from the law before that statute. (See *ante*, Ch. VII.) If a tenant by the *curtesy* makes a conveyance of the estate *in fee*, he thereby creates a forfeiture of his estate, and the reversioner has thereupon an immediate right to enter. *French v. Rollins*, 8 Shep. (Me.) 872. But, where a tenant by the curtesy of an undivided portion of an estate had abandoned the land for more than forty years, leaving it in the possession of another tenant in common, whose occupancy was an ouster; it was held, that the reversioner of such undivided portion of the estate had no right of entry upon the tenant in possession, during the life of the tenant by the curtesy, his abandonment of the land being no forfeiture of the estate. *Witham v. Perkins*, 2 Greenl. (Me.) 400.

<sup>1</sup> Per Mr. Justice Taunton, in *Allen v. Blakeway*, 5 Carr. & Payne, 568; and 24 Eng. Com. Law, 456.

<sup>2</sup> *Allen v. Blakeway*, *supra*.

<sup>3</sup> This was held under the statute of 8 and 4 Will. IV., the 3d section of which provides expressly, agreeably to the before-settled construction, that, in case of remainders or reversions, the time runs from the time when the remainder or reversion becomes an estate in possession. *Nepean v. Knight*, 2 Mees. & Welsb. (Ex.) 911. And see *French v. Rollins*, 8 Shep. (Me.) 872.

rect evidence. In a case where the plaintiff in ejectment deduced his title to the land in question, he gave in evidence a grant for the land in 1671 to T. P. and R. B., and that T. R. was seised and possessed of the land, and died so seised in 1746, having, by his will, in 1744, devised the land in tail to his son F. R. *after his mother's death*. In 1780, F. R., being in possession, conveyed the land to B. G., who died intestate, in 1800, leaving six children, one of whom conveyed all his interest to the lessor of the plaintiff. It was contended that the death of the tenant for life was not proved; but it was held, that the life-estate, set up to defeat the action, must, from the length of time that had elapsed (1746 to 1808) be considered as having expired before the ejectment was brought; and, consequently, the plaintiff was entitled to recover.<sup>1</sup>

377. When an action of ejectment is brought within the time limited by the statute for the right of entry upon land, the confession of lease, *entry* and *ouster*, includes all the essential formalities, and proof of an *actual* entry is dispensed with.<sup>2</sup> But when the action is not brought until after the time limited has expired, it is incumbent on the lessor of the plaintiff to prove an actual entry within such time;<sup>3</sup> that is, the entry must be upon the land in question. In an ancient case, where a fine was levied, the lessor of the plaintiff proved that, at the *gate* of the house in question, he said to the tenant that he was heir to the house and the land, and forbade him to pay rent for the future to the defendant. It was agreed that the claim at the gate would not have been sufficient, had it not appeared that there was a court before the house which *belonged to it*; and, such being the case, the claim was on the land, and, consequently, was held good.<sup>4</sup> In a very modern case in this country, it was held, that the acts of riding along the public highway, which passed over certain lots, and there making

<sup>1</sup> Stephenson v. Howard, 3 H. & Johns. (Md.) 554.

<sup>2</sup> 8 Cruise, Dig. 483; 1 Saund. 819, n.; Jackson v. Crysler, 1 Johns. (N. Y.) Ca. 125; Bond v. Hopkins, 1 Sch. & Lefr. 418; Hall v. Vandergrift, 8 Binn. (Penn.) 874; Smith v. Burtis, 9 Johns. (N. Y.) 174; Jackson v. Cairns, 20 Ib. 301; Demarest v. Wynkoop, 3 Johns. (N. Y.) Ch. 129; Den v. Morris, 2 Halst. (N. J.) 6.

<sup>3</sup> 2 Cruise, Dig. 501; Berrington v. Parkhurst, 18 East, 489; Doe v. Danvers, 7 Ib. 299; Goodright v. Cator, Doug. 477; Shearman v. Irvin's Lessee, 4 Cranch (U. S.), 367; Jackson v. Haviland, 18 Johns. (N. Y.) 229; Brown v. Porter, 10 Mass. 98; Harbaugh v. Moore, 11 Gill & Johns. (Md.) 288; Ridgley v. Ogle, 4 H. & Johns. (Md.) 128. To avoid the statute, it is not necessary to bring an action; it is sufficient to make an entry upon the land. Altemus v. Campbell, 9 Watts (Penn.), 28.

<sup>4</sup> Anon. Skinn. 412.

an inquiry about them, have not the requisite properties of an entry.<sup>1</sup> Where a part of the land claimed is in one county and part in another, there must be a distinct entry for each county; but if the whole be in one county, an entry, with a declaration in the name of the whole, is sufficient.<sup>2</sup> If, by force or fraud, the party is prevented from making an actual entry on the land claimed, his intent to do so, declared as near the land as possible, is equivalent to an actual entry.<sup>3</sup>

378. The material point is, that the entry be made *animo clamandi*; and no entry, where it appears at the time that there was no *intention* of making claim, will be of any effect.<sup>4</sup> Where, therefore, a party, by invitation of the tenant, went into a cellar to see its antiquity, it was adjudged to be no such entry as would vest the possession in the person so entering.<sup>5</sup> Again, where the evidence was, that the party claiming to have made an entry went to the house occupied by the defendant, by agreement with him, to see it, with an expectation of his taking a lease, or making an arrangement or compromise with him, but not to take possession, and nothing of the kind was effected; it was held, that this was not such an entry as would avoid the statute.<sup>6</sup> The entry must be such as to challenge the right of the occupant; or, in other words, it must bear on the face of it an unequivocal intent to resume the actual possession.<sup>7</sup>

379. A guardian for nature or in socage may enter in the name of his ward, without any command or assent; and so, also, the remainder-man or reversioner may enter in the name of tenant for

<sup>1</sup> Robinson v. Sweet, 8 Greenl. (Me.) 316. And see Proprietors of Kennebec Purchase v. Laboree, Ib. 275.

<sup>2</sup> Co. Litt. § 419; Jackson v. Lunn, 3 Johns. (N. Y.) Ca. 115.

<sup>3</sup> 2 Cruise, Dig. 501; Jackson v. Schoonmaker, 4 Johns. (N. Y.) 389; Jackson v. Haviland, 18 Ib. 229.

<sup>4</sup> See authorities just above cited. An entry to purge a disseisin should be made with that intention; and such intention should be sufficiently indicated, either by the act itself, or by words accompanying the act. Per Weston, J., in delivering the opinion of the court, in Robinson v. Sweet, 8 Greenl. (Me.) 316. Whether an entry and making a survey amount to an entry *animo clamandi*, is a question for the jury, not for the court. Miller v. Shaw, 7 Serg. & Rawle (Penn.), 129. See also Brown v. McKinney, 9 Watts (Penn.), 567; Holtzapple v. Phillibaum, 4 Wash. (Cir. Co.) 567. [Dillon v. Mattox, 21 Ga. 118.]

<sup>5</sup> Plowd. 92, 93.

<sup>6</sup> Altemus v. Campbell, 9 Watts (Penn.), 28.

<sup>7</sup> Gibson, Ch. J., in Altemus v. Campbell, *supra*; Waterhouse v. Martin, Peck (Tenn.), 392. [The recovery of a judgment in an action of ejectment without an entry does not stop the running of the statute. Kennedy v. Reynolds, 27 Ala. 364.]

life, or years, or those particular tenants in the name of the reversioner or remainder-man, without any command or assent, on account of the privity between the parties.<sup>1</sup> So, likewise, an entry by a *cestui que trust* will be sufficient;<sup>2</sup> and, as the entry of one joint-tenant, coparcener, or tenant in common will avoid the effect of a fine as to the other joint or cotenant or coparcener,<sup>3</sup> it will have the effect to avoid the statute of limitations.<sup>4</sup>

<sup>1</sup> Podger's Case, 9 Co. 106 (a); *McMasters v. Bell*, 2 Penn. 180.

<sup>2</sup> *Gree v. Rolle*, 1 Ld. Raym. 716.

<sup>3</sup> *Tidd*, P. R. 1199; *Steph. N. P.* 1894; *Gill v. Pearson*, 6 East, 178.

<sup>4</sup> *Watson v. Gregg*, 10 Watts (Penn.), 296. [What facts constitute, as well as the question whether the facts constitute, an entry, shall be left to the jury. *Hooper v. Garver*, 15 Penn. St. (8 Harris) 517. An entry by an agent is sufficient. *Ingersoll v. Lewis*, 11 Penn. St. (1 Johns.) 212. And a subsequent ratification of the entry of a person unauthorized originally to make it, is equivalent to an entry by previous command. *Hinman v. Cranmer*, 9 Barr (Penn.), 40.]

## CHAPTER XXXI.

## ADVERSE POSSESSION.

380. THE circumstances under which the occupation of land constitutes a possession sufficient to defeat the right of entry under the statute of limitations are the foundation upon which all real and possessory actions are supported. The doctrine, therefore, by which the limitation of the action in every case is governed is of much moment, and one which, in the United States, has afforded a field of judicial discussion and decision, correspondent in length, breadth, and variety to the occupied territorial limits within their jurisdiction; limits which embrace immense tracts of soil but here and there reclaimed from their primeval condition, as well as densely populated commercial and manufacturing cities and districts, almost innumerable. As a general doctrine, it has too long been established to be now in the least degree controverted, that what the law deems a perfect possession, if continued without interruption during the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee. Independently of positive or statute law, the possession supposes an acquiescence in all persons claiming an adverse interest; and upon this acquiescence is founded the presumption of the existence of some substantial reason (though perhaps not known), for which the claim of an adverse interest was forborne. Not only every legal presumption, but every consideration of public policy, requires that this evidence of right should be taken to be of very strong, if not of conclusive, force.<sup>1</sup> There are some statutes which,

<sup>1</sup> See *ante*, Chap. I. An adverse possession, where it actually exists, may be set up against any title whatever, and to make out a title under the statute of limitations. Per Johnson, J., in giving the opinion of the Supreme Court of the United States, in *Bradstreet v. Huntingdon*, 5 Peters (U. S.), 438. *Jackson v. Diffendorf*, 3 Johns. (N. Y.) 267. [*Leffingwell v. Warren*, 2 Black (U. S.), 599. An alien incapable of holding land may avail himself of this defence. *Overing v. Russell*, 32 Barb. (N. Y.) 263.] See also Heinneccius, p. 6, § 208; Gro. L. 2, c. 4, p. 86; Run. on Eject. 59; *Stokes v. Berry*, Salk. 421. An undisturbed possession of twenty years is evidence of an estate in fee if no other title appear, and upon such evidence a plaintiff may

as has been shown, not only take away the remedy for the right of entry, after a certain length of possession, but enact in express terms that such length of uninterrupted possession shall of itself constitute a complete title.<sup>1</sup> In controversies, however, between States, relating to boundaries, the statutes of limitation will not be so applied in all their rigor, nor will a title be acquired by prescription as readily.<sup>2</sup>

381. The belief is, that no case can be put in which a private individual knows that another person claims, and is in the actual enjoyment of, land which belongs to him, and neglects to prosecute his right at law, where *there is nothing to prevent* his doing so, that he will not be barred by the statute of limitations.<sup>3</sup> Where neither party has title in an action of ejectment, it is clear that the party showing the prior possession is entitled to recover, unless the last possession has been continued adversely for the time which the statute of limitations prescribes.<sup>4</sup> It is also unquestionable, that

recover in ejectment. *Dennis v. Barnard*, Cowp. 597, per Lord Mansfield. See also *Catteris v. Cowper*, 4 Taunt. 547; *Jackson v. Richtmyer*, 16 Johns. (N. Y.) 134; *Jackson v. Wheat*, 18 Ib. 40; *Jackson v. Newton*, 18 Ib. 355; *Fanning v. Wilcox*, 3 Day (Conn.), 258; *Shearman v. Irvine's Lessee*, 4 Branch (U. S.), 367; *Somerville v. Hamilton*, 4 Wheat. (U. S.) 220; *Ray v. Smith*, 2 Bay (S. C.), 339; *Munshower v. Patten*, 12 Serg. & Rawle (Penn.), 334; *Denn v. White*, 1 Coxe (N. J.), 94; *Jackson v. Davis*, 5 Cowen (N. Y.), 130; *Paderick v. Searle*, 5 Serg. & Rawle (Penn.), 240; *Smith v. Lorillard*, 10 Johns. (N. Y.) 357; *Jackson v. Dysting*, 2 Caines (N. Y.), Cas. 198. In a thickly settled country, after possession for the time limited by the statute, partly by a church and partly by a burying-ground, a grant of the land, it has been held, in Pennsylvania, will be presumed a pre-emption right. *Mathers v. Ministers of Trinity*, 3 Serg. & Rawle (Penn.), 509. A plaintiff in ejectment, claiming premises in fee, may recover, although he relies only upon possession for the establishment of his title. *Cincinnati v. White*, 6 Peters (U. S.), 431; *Day v. Alverson*, 9 Wend. (N. Y.) 223; 8 Ham. (Ohio) 57; *Holtzapple v. Phillibaum*, 4 Wash. (Cir. Co.) 356.

<sup>1</sup> See some of these noticed, *ante*, Chap. I.

<sup>2</sup> *Rhode Island v. Massachusetts*, 15 Peters (U. S.), 238. [s. c. 4 How. (U. S.) 591.]

<sup>3</sup> As per Chancellor Harper, in *Drayton v. Marshall*, 1 Rice (S. C.), Eq. 373. [*Armstrong v. Risteau*, 5 Md. 256.]

<sup>4</sup> *Jackson v. Hubble*, 1 Cowen (N. Y.), 613; *Cincinnati v. White*, 6 Peters (U. S.), 431; *Jackson v. Pontes*, Paine (Cir. Co.), 457; *Den v. McCan*, 2 Penn. 438; *Den v. Albough*, Ib. 446. [The prior possession must be such as will enable the prior possessor to maintain trespass against the subsequent possessor. *Sowers v. McMillan's Heirs*, 4 Dana (Ky.), 456. And this need not be so long as to give title by adverse possession, in order to make a *prima facie* case against one who makes entry without any lawful claim, and where he has no other evidence of title. *Smith v. Lorillard*, 10 Johns. (N. Y.) 338. One may become seised as against all but the true owner by acts which do not amount to a disseisin of the latter. *Slater v. Ransom*, 6 Met.



where land has been held under a claim to the fee, for the time prescribed by the statute, and an entry is made by the party who has the written title, such party may be dispossessed, by an ejectment brought by him who has so held and claimed.<sup>1</sup> Where a defendant, in an action of ejectment, having been thirty-eight years in undisturbed possession, suffered judgment by default, and was turned out of possession, he, notwithstanding, was able to recover the premises in question, on the ground of his previous possession.<sup>2</sup> The possession under claim of right may be set up not only against any title whatsoever, to make out a title under the statute of limitations, but to show the nullity of a conveyance executed by one out of possession.<sup>3</sup> Where a plaintiff in ejectment produced a patent, which had not been granted for twenty years, and the defendant proved an outstanding older patent in another person, which was barred by twenty years' possession of the defendant, it was held that the plaintiff could not recover.<sup>4</sup> Indeed, it is not necessary in every case, that the plaintiff should show a possession for the whole time prescribed by the statute, or a paper title; for a prior possession for a less period, under a claim of right, will raise a presumption of title sufficient to put the tenant on his defence, provided it appear that such prior possession of the plaintiff was not voluntarily relinquished, without the *animus revertendi*.<sup>5</sup>

(Mass.) 489; *Woods v. Banks*, 14 N. H. 101. Actual possession of land or of personal property is evidence of title, and good against a stranger having no title. *Hubbard v. Little*, 9 Cush. (Mass.) 476; *Bowley v. Walker*, 8 Allen (Mass.), 21; *Burke v. Savage*, 18 Allen (Mass.), 408.]

<sup>1</sup> *Cincinnati v. White*, *supra*; *Jackson v. Pontes*, *supra*; *Devatch v. Newsam*, 8 Ohio, 57; *Jackson v. Oltz*, 8 Wend. (N. Y.) 558; *Day v. Alverson*, 9 Ib. 223; *Jackson v. Rightmyer*, 16 Johns. (N. Y.) 814; *Gibson v. Bailey*, 9 N. H. 168.

<sup>2</sup> *Jackson v. Diffendorf*, 8 Johns. (N. Y.) 269, recognized in *Jackson v. Rightmyer*, *supra*.

<sup>3</sup> *Bradstreet v. Huntingdon*, 5 Peters (U. S.), 402. And see *Sicard v. Davis*, 6 Ib. 124.

<sup>4</sup> *Chiles v. Calk*, 1 A. K. Marsh. (Ky.) 58. [A had patents for two tracts of land, adjoining each other, dated in 1784, and in 1790 he entered upon one tract and enclosed part of it, and retained possession to the time of the action. B claimed under two entries, made in 1780 and 1788, for the purpose of taking possession in view of a future survey. B took possession in 1889, and brought an action of ejectment against A. Held, that his right of entry and action was barred by the statute of limitations, and that A's title was good. *Rogers v. Moore*, 9 B. Mon. (Ky.) 401. The lien of a judgment is not a title to land against which the statute of limitations runs, it being a mere security. *Kempar v. Adams*, 5 McLean, 507.]

<sup>5</sup> *Jackson v. Rightmyer*, 16 Johns. (N. Y.) 814; *Smith v. Lorillard*, 10 Ib. 338; *Den v. Morris*, 2 Halst. (N. J.) 6.

382. *A fortiori*, will the doctrine as above laid down be acted upon by courts of equity? <sup>1</sup> In the Supreme Court of the United States, the chief justice, in referring to the case of *Cholmondeley v. Clinton*,<sup>2</sup> says: "It was considered and treated by the court as a case of the highest importance, and the opinion was unequivocally expressed that, both on principle and authority, the laches and non-claim of the rightful owner of an equitable estate, for a period of twenty years (supposing it the case of one who must, within that period, have made his claim in a court of law, had it been a legal estate), under no disability, and where there has been no fraud, will constitute a bar to equitable relief, in analogy to the statute of limitations, if, during all that period, the possession has been held under a claim unequivocally adverse."<sup>3</sup> In an appeal from the Circuit Court of the United States, sitting as a court of equity, in which the right to a ferry was in question, the Supreme Court considered that the complainants had so long slept upon their rights, that the court could do nothing; and this was equally true, whether they knew of an adverse possession or through negligence, and a failure to look after their interests, permitted the title of another to grow into maturity.<sup>4</sup> Where the statute directly applies in courts of equity, the presumption is not in general resorted to; but if the circumstances of the case are very cogent, and require it, it is held, that a grant may be presumed within a period even short of the statute.<sup>5</sup>

383. As an adverse possession, then, for the time limited by the statute, confers a right, a purchaser of real estate must not trust merely to the papers and records, but must inquire of the person whether he claims to be the owner of the premises. Publicity and notoriety of possession are sufficient to put a purchaser upon inquiry, and amounts to constructive notice.<sup>6</sup> Putting a fence, for an example, around the land, or erecting buildings upon it, are constructive notice to all the world.<sup>7</sup> And it has been held that, to

<sup>1</sup> See *ante*, Chap. III. And see *Hawley v. Cramer*, 4 Cowen (N. Y.), 718; *Briscoe v. Prewett*, 4 Bibb (Ky.), 878.

<sup>2</sup> *Lord Cholmondeley v. Lord Clinton*, 2 Jac. & Walk. 1.

<sup>3</sup> *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 168.

<sup>4</sup> *Bowman v. Wathen*, 1 How. (U. S.) 189.

<sup>5</sup> *Ricard v. Williams*, 7 Wheat. (U. S.) 59. And see *Piatt v. Vattige*, 9 Peters (U. S.), 405. [But see *Dugan v. Gittings*, cited in note to § 25.]

<sup>6</sup> *Bradstreet v. Huntingdon*, 5 Peters (U. S.), 402.

<sup>7</sup> *Poignard v. Smith*, 6 Pick. (Mass.) 172.

prevent the operation of the statute, a parol acknowledgment of the adverse possession by the person in possession must be such as to show that he intends to hold no longer under a claim of right; but declarations made merely with a view to compromise a dispute are not sufficient.<sup>1</sup>

384. The law, however, deems every person to be in the legal seisin and possession of the land to which he has a perfect and complete title; and this seisin and possession is co-extensive with his right, and continues till he is ousted thereof by an actual possession in another, *under a claim of right*. This may be considered a settled principle of the common law, and has been recognized and adopted as such by the Supreme Court of the United States.<sup>2</sup> The fact of possession *per se* is only an introductory fact to a link in the chain of title by possession, and will not simply of itself, however long continued, bar the right of entry of him who was seised, and, of course, create no positive title in any case. The reason is, that it may not have been originally taken, or subsequently held, with an intention to claim the premises as owner, and may have been with a perfect understanding between the possessor and the proprietor, that the latter is all the time to be regarded as such. The reason, in other words, is, that it may be a *permissive* possession, which, in the language of the Master of the Rolls, in *Lord Cholmondeley v. Lord Clinton*,<sup>3</sup> “however long it may, in point of fact, have endured, could never ripen into a title against anybody; for it was not considered as the possession of the precarious occupier, but of him upon whose pleasure its continuance depended.” It is not the possession alone, says Mr. Justice Thompson, but that it is accompanied with the claim of the fee, which by construction of law is deemed *prima facie* evidence of such an estate.<sup>4</sup> Chief Justice Marshall says, that it has not only been recognized in the courts of England, but in all others where the rules established in those courts have been adopted, that a possession which was permissive and entirely consistent with the title of another should not bar that title, and that it would shock the sense of right, which must be felt by all legislators and all judges,

<sup>1</sup> *Sailor v. Hertzog*, 4 Whart. (Penn.) 259.

<sup>2</sup> *United States v. Arredondo*, 6 Peters (U. S.), 748. Also *Clarke v. Courtney*, 5 Ib. 354; *McIver v. Ragan*, 2 Wheat. (U. S.) 29. See also *La Frambois v. Jackson*, 8 Cowen (N. Y.), 589. [*Gittens v. Lowry*, 15 Ga. 886.]

<sup>3</sup> 2 Jac. & Walk. 1.

<sup>4</sup> *Jackson v. Ponton*, Paine (Cir. Co.), 457.

were it otherwise.<sup>1</sup> So long, for instance, as the possessor declares that he holds in subordination to the better title, the possession will be regarded as held by consent; nor will a continued possession, after such declarations, avail to mature a title under the statute of limitations, until the party has changed the character of his possession, either by express declaration, or by the exercise of acts of ownership inconsistent with a subordinate character.<sup>2</sup> If one be owner of a tract of land, and, at the same time, the agent of the owner of an adjoining tract, he cannot avail himself of the statute, to support his title to a part of the land of his principal of which he had taken possession, upon a misapprehension of the new boundary; nor can any one, claiming under such assent, avail himself of his possession.<sup>3</sup> Where parties agreed upon a fence, variant from the true line, avowedly for convenience, and still continued to claim up to the true line, neither party acquires a title, or right of possession, against the other merely by virtue of the fence.<sup>4</sup>

<sup>1</sup> *Kirk v. Smith*, 9 Wheat. (U. S.) 241, 288. [Where a defendant in ejectment sells the property in dispute while the proceedings are pending, a possession by the vendee will not justify the plea of the statute of limitations. *Walden et al. v. Bodley's Heirs*, 9 How. (U. S.) 84. But where a defendant in execution remains in possession of the land sold, his possession is not necessarily permissive, and he is not estopped from setting up an adverse possession, which, if continued twenty years, will give him a good title. *Chalfin v. Malone*, 9 B. Mon. (Ky.) 496. And see also *Batterton v. Chiles*, 12 B. Mon. (Ky.) 848.]

<sup>2</sup> *Markley v. Amos*, 2 Bail. (S. C.) 608; *Jackson v. Denison*, 4 Wend. (N. Y.) 558. [*Ray v. Barker*, 1 B. Mon. (Ky.) 364; *Moore v. Moore*, 8 Shep. (Me.) 350; *Read v. Thompson*, 5 Barr (Penn.), 108; *Moore v. Johnston*, 2 Spears (S. C.), 288; *Dikeman v. Parrish*, 6 Barr (Penn.), 210; *Hall et ux. v. Stevens*, 9 Met. (Mass.) 418; *Millay v. Millay*, 6 Shep. (Me.) 387; *Lamb v. Foss*, 8 Ib. 240. And although the declarations of one in possession of land that he holds in subordination to the legal title cannot affect the right of his grantee, when made after a conveyance, yet they defeat any claim of title acquired by the grantee himself, prior to the conveyance by disseisin. *Hamilton v. Paine*, 5 Shep. (Me.) 210.]

<sup>3</sup> *Comegys v. Carley*, 8 Watts (Penn.), 280. [But where one enters on land with title, claiming it as his own, and afterwards before seven years (the limited time) expire, undertakes an agency for one holding an elder patent for the same land, and claims to hold under it, without abandoning his own title, or the possession under it, his heir is not estopped to set up his own title and right to possession under it. *Ray v. Barker*, 1 B. Mon. (Ky.) 364.]

<sup>4</sup> *Burrell v. Burrell*, 11 Mass. 296. But where they have established a line varying from the land described in the deeds, and each party has held and occupied up to his side, claiming to hold accordingly, for twenty years, neither can maintain a possessory action against the other. *Ibid.* [So if they agree upon a dividing line, and occupy accordingly. *Brown v. Cockerell*, 33 Ala. 88. If the land is held by a mistake in the division, the statute begins to run only from the time of some unequivocal act indicating a claim to the part held by mistake. *Phelps v. Henry*, 15 Ark. 297.]

And if the respective claimants to a disputed tract agree to submit the matter to arbitration, and that meanwhile the party occupying shall remain in possession, the running of the statute is suspended.

The declarations of a widow in possession of premises, that she held them for her life, and that, after her death, they would go to the heirs of her husband, are admissible evidence to negative the fact of her having twenty years' possession under a claim of right.<sup>1</sup> And it has been held, that, if a widow remains in possession of land after her husband's death, and marries again, and she and her husband continue in possession, for more than the time limited for the right of entry, neither she nor he can set up the statute against an ejectment by the children of the first husband.<sup>2</sup> There was a very rigid application of the law, in this respect, in a very modern case, in the Court of King's Bench, in Ireland, in which it was held, that, where on the death of a father intestate, seised of lands in fee, his second son enters without title, such entry is deemed for the use of the eldest son; and the statute, therefore, does not run against such eldest son, the possession of the second son being *his* possession. The real principle, to be extracted from all the cases, the court said, is, that the possession of the younger brother so entering, is the possession of the heir, who, therefore, cannot be affected by length of time, upon the supposition of a possession adverse to him; and, on this principle, the court found an answer to the argument that the circumstances or motives of the party taking possession ought to be left to the jury; because the question is, not why the one person took possession, *but why the other submitted to it*; and in the absence of any proof to the contrary, it must be intended that he did so because (as the law intends) it was taken *for* him.<sup>3</sup> The law as to forbidding the set-

So if a fence is by mistake extended beyond the true line, it is no adverse possession, there being no intention to claim beyond the true line. *St. Louis University v. McCane*, 28 Mo. (7 Jones) 481; *Howard v. Reedy*, 29 Ga. 152; *Perkins v. Blood*, 86 Vt. 278.]

<sup>1</sup> *Human v. Pettett*, 5 Barn. & Ald. 228. [*Calhoun v. Cook*, 9 Barr (Penn), 226. And see also *Hall v. Matthias*, 4 Watts & Ser. (Penn.) 381.]

<sup>2</sup> *Cook v. Nicholas*, 2 Watts & Ser. (Penn.) 27. [And see *Hall v. Matthias*, 4 Watts & Ser. (Penn.) 381.]

<sup>3</sup> *Dowdall v. Byrne*, Batt. (Irish) 878. The court refer to the section of Littleton, 896, which states such an entry by a younger brother for the benefit of the heir to be an intendment of law, and does not qualify it by any reference as to the motive for taking the possession. The note on that section refers to Gilbert on Tenures, where the doctrine is stated in these words: "When a younger brother enters in this case, he does not enter to get a possession distinct from that of the elder brother, but to

ting up of a right under a permissive possession is stated very emphatically, by the Court of Appeals of South Carolina, that, "where a party claims by the statute, he is required to show at what time he took possession of the land, and how long he has held it; and when a tenant claims to hold adversely, he must show when that intention was made known to the landlord."<sup>1</sup>

385. Every presumption, therefore, is to be made in favor of the true owner, and a bare possession is evidence of no more than the fact of present occupation by right; for the law never presumes a wrong.<sup>2</sup> The parol declarations of a person in whom the title to land is vested are inadmissible as evidence to defeat that title, it being contrary to the statute of frauds.<sup>3</sup> All the decisions to this effect are highly important, and necessary to be observed in a country like ours,<sup>4</sup> though the doctrine which supports them is among the deep foundations of English law.<sup>5</sup> In respect to the very ancient statute of fines, which is virtually a statute of limitation, it has been long the settled doctrine of the English courts, that he who has the estate or interest in him cannot be put to his action, entry, or claim; for he has that which the action, entry, or claim would vest in, or give him.<sup>6</sup> From this, says a well-known learned compiler of the English law of real property,<sup>7</sup> it follows

preserve the possessions of the brother in the family that nobody abates." (Gib. on Ten. 28.) And in Mr. Watkins's note on the passage, it is observed that the rule upon this subject is so strong, that the entry of a younger brother of the half blood, upon the elder brother, will be an entry for him, and will have the effect of creating a *possessio fratris* in that elder son, to prevent the descent to the younger brother of the half blood, who had entered upon him, and make the sister of the whole blood the heir. That is, in other words, to say that, by such an entry alone, there is no disseisin, and that the possession cannot be adverse. The court, in the above case, also rely on *Page v. Selfby*, Bull. N. P. 102; *Reading v. Rawsterne*, 2 Salk. 428; and *Fairclaim v. Shackelton*, 5 Burr. 2604.

<sup>1</sup> *Whaley v. Whaley*, 1 Spears (S. C.), 225. See further the following chapters relating to Co-Tenants, Landlord and Tenant, Mortgagor and Mortgagee, and Trustee and *Cestui que trust*.

<sup>2</sup> Per Mr. Justice Story, in *Ricard v. Williams*, 7 Wheat. (U. S.) 59. And see, likewise, *Smith v. Lorillard*, 10 Johns. (N. Y.) 855; *Jackson v. Rightmyer*, 16 Ib. 825; *Blaisdell v. Martin*, 9 N. H. 258; *Straw v. Jones*, Ib. 400; *Codman v. Winslow*, 10 Mass. 146; *Jackson v. Thomas*, 16 Johns. (N. Y.) 298; *Huntington v. Whaley*, 29 Conn. 891; *Jones v. Hockman*, 12 Iowa (4 With.), 101; *Harvey v. Tyler*, 2 Wallace (U. S.), 828; *Clagett v. Conlee*, 16 Iowa, 487.

<sup>3</sup> *Jackson v. Cary*, 16 Johns. (N. Y.) 298; *Daniel v. Ellis*, 1 Marsh. (Ky.) 60.

<sup>4</sup> Per Spencer, J., in *Jackson v. Todd*, 2 Caines (N. Y.), 153.

<sup>5</sup> See *ante*, Ch. I.

<sup>6</sup> *Podger's Case*, Rep. 104.

<sup>7</sup> 8 Cruise, Dig. 485.



that no person can plead the statute of limitations, unless his possession has been *adverse* to that of the person who claims against him. The term "adverse possession" is familiar, in the modern common law, as denoting *disseisin*, upon which an adverse title is founded;<sup>1</sup> the old term "disseisin" being expressive of any act, the necessary effect of which is to divest the estate of the former owner.<sup>2</sup>

386. Much acute and profound reasoning is to be found in the old books respecting the subject of *disseisin*; and the subject has been learnedly discussed, both by eminent juridical writers, and by judges in numerous cases. Before the use of letters, all property in land passed by a formal act of *investiture*; for the reason, that, as no one could originally appropriate land to himself but by occupying it, and applying it to his own use, so no one could transfer it but by a ceremonious and notorious surrender of the possession. This was denominated *livery of seisin*; and, without this methodical procedure, there could be no seisin. Seisin, therefore, in its genuine meaning, denotes the completion of such ceremony of investiture, by which the tenant was admitted into his freehold.<sup>3</sup> Hence, disseisin was depriving, by some means or other, the tenant of his tenure, and usurping his place and feudal relation.<sup>4</sup> At that time, there was a difference between a disseisin and a dispossession. The disseisins of that period were, in some instances, supported as an encouragement to those who performed the services. The services were to be performed annually; and, if the party disseised allowed the disseisor to perform them for a year, and the disseisor died seised, the entry of the heir was taken away, on the principle that he was to lose the feud, unless he performed the services to the lord. In process of time, the assise of novel disseisin was invented;<sup>5</sup> and, after its introduction, the

<sup>1</sup> See *Reading v. Rawsterne*, 2 Ld. Raym. 829.

<sup>2</sup> *Preston on Abs. of Title*, 383. The possession must be so open and exclusive as to amount to a disseisin. *Sparhawk v. Bullard*, 1 Met. (Mass.) 95.

<sup>3</sup> Coke says that seisin signifies, in the common law, *possession*. Co. Litt. 153 a. Again he says, that seisin is derived from *sedendo*. "For, until a man have seisin, all is *labor et dolor et vexatio spiritus*; but, when a man hath seisin, he may *sedando et acquiescere*. In all suits to recover seisin or possession, he who prosecutes them ought to labor; but, when he hath obtained seisin, he may *sedere et accumbere* in peace and tranquillity." 6 Rep. 58. . See *Frost v. Cloutman*, 7 N. H. 15.

<sup>4</sup> 2 Bac. Abr. 482; *Taylor v. Horde*, 1 Burr. 107; *Green v. Liter*, 8 Cranch (U. S.), 229.

<sup>5</sup> Co. Litt. 153.



courts, by liberal constructions in furtherance of justice, extended the remedy to every kind of trespass or injury done to real property, whether the trespass or injury come within the exact definition of a disseisin or not. If, by bringing an assise, the party thought proper to admit himself disseised, every thing was called a disseisin for which an assise would lie.<sup>1</sup> It was in reference to this kind of disseisin, as between owner and trespasser, that Littleton wrote ; or, in other words, he considered every thing wrong to the possession to be a disseisin. What he means shall be understood by disseisin appears by what he says of seisin, which he considers to be *wrongful possession*. “A disseisin,” he says, “is where one enters intending to usurp the possession, and to oust another of his freehold ; and, therefore, ‘quærendum est a iudice quo animo, hoc fecerit’ why he entered and intruded.” The inquiry is into the *quo animo*, or into the intent with which the possession is taken and held, as it appears in evidence. As expressed by the Supreme Court of the United States, “the whole inquiry is reduced to the fact of entering, and the intention to usurp possession ;”<sup>2</sup> and, in legal language, the intention guides the entry, and fixes its character.<sup>3</sup>

387. The distinctions between a disseisin in fact and a disseisin by election were brought into view and enforced in *Atkyns v. Horde* ;<sup>4</sup> and they have been historically and ingeniously illustrated by Mr. Butler, in a note to his edition of *Co. Litt.* To constitute an actual disseisin, or one in fact, there must be a tortious entry and an expulsion. The distinction between a disseisin by election, as contra-distinguished from a disseisin in fact, was taken for the benefit of the owner of the land, and to extend to him the easy and desirable remedy by assise, instead of the more tedious remedy of a writ of entry. Whenever an act is done which of itself works an actual disseisin, it is still taken to be an actual disseisin, as if a tenant for years or at will should enfeoff in fee. On the other hand, those acts which are susceptible of being made dis-

<sup>1</sup> *Co. Litt.* 153.

<sup>2</sup> *Bradstreet v. Huntingdon*, 5 Peters (U. S.), 440, in which case the court cite *Pawlett v. Clarke*, 4 Ib. 504 ; *Blight's Lessee v. Rochester*, 7 Wheat. (U. S.) 585 ; *Willison v. Watkins*, 8 Peters (U. S.), 53 ; *Barr v. Gratz*, 4 Wheat. (U. S.) 213.

<sup>3</sup> *Ewing v. Burnett*, 11 Peters (U. S.), 41. Entry on, and occupation of, open land, in the mistaken belief that the title was in the United States, is adverse to the true owner. *Clemens v. Runckel*, 34 Mo. 41.

<sup>4</sup> 1 Burr. 60.

seisins by election are no disseisins till the election of the party makes them so ; as if a tenant at will, instead of making a feoffment in fee, should only make a lease for years.<sup>1</sup> There is, says Mr. Justice Story, a distinction between disseisins which are in *spite* of the owner, and disseisins at his election. But the distinction often turns upon other principles than those which have been stated. The owner cannot elect to consider himself disseised, where the act is not of such a nature as, in law, affords a presumption of a disseisin. But where an act is done, which is equivocal, and may be either a trespass or disseisin, according to the intent, there the law will not permit the wrong-doer to qualify his own wrong, and explain it to be a mere trespass, unless the owner elects so to consider it.<sup>2</sup>

388. According to Lord Mansfield, in *Atkyns v. Horde*, above mentioned, the exploded distinction between disseisin and dispossession was taken for the last time in *Matthewson v. Trot*.<sup>3</sup> Chief Justice Tilghman says: "Lord Mansfield has told us, that of seisin and disseisin very little was known in his time, *but in name*. In Pennsylvania, we certainly have not been in the habit of going deeply into that antiquated subject; nor is it material to inquire whether Abbot, or those who came after him, acquired a seisin, according to the strict import of the term. Our law permits all persons, whether in or out of seisin or possession, to transfer their claim, such as it is, good or bad, by deed or will. And I have no manner of doubt that one who enters as a trespasser, clears land, builds a house, and lives in it, acquires something which he may transfer to another."<sup>4</sup> "Notwithstanding," says Mr. Justice Story,

<sup>1</sup> See opinion of Kent, J., in *Jackson v. Rogers*, 1 Johns. (N. Y.) Ca. 86.

<sup>2</sup> Per Mr. Justice Story, in *Prescott v. Nevers*, 4 Mason (Cir. Co.), 329. See also, cited by the learned judge, *Jerrist v. Weare*, 8 Price, 575; *Proprietors of No. 6 v. McFarland*, 12 Mass. 825. [In order to give a party his right to elect to consider himself disseised, there must be what can in law be considered a possession of the supposed disseisor, either wrongful in itself or made wrongful by some act or claim of his, inconsistent with, and in derogation of, the right of the owner. *Towle v. Ayer*, 8 N. H. 67. If the person having the title and the right of entry into lands make an actual entry upon the tenant in possession, who resists the entry and persists in the occupation, this is a disseisin at the election of the owner, upon which a writ of entry may be maintained, although the tenant may show on the trial that he held by lease under one without title. *Dow v. Plummer*, 5 Shep. (Me.) 14. By a levy on real estate, the debtor in possession becomes the tenant at will of the creditor, and if he resists the entry of the creditor, he may treat him as a disseisor at his election. *Bryant v. Tucker*, 1 App. (Me.) 388.

<sup>3</sup> 1 Leon. 299.

<sup>4</sup> *Overfield v. Christie*, 7 Serg. & Rawle (Penn.), 177.

“the language of Lord Mansfield, in *Atkyns v. Horde*,<sup>1</sup> what constitutes a disseisin is, at least, in this country, well settled.”<sup>2</sup> The tendency of modern decisions, in England, has been to disclaim the admission of any species of disseisin, where the consequence would be to work moral injustice, and particularly where the party entered by a good title; and the old learning on the subject is much qualified by recent cases.<sup>3</sup>

389. *Ouster* is a term sometimes used for disseisin. It is a general name, which includes disseisin, properly so called, as well as abatement, intrusion, and discontinuance.<sup>4</sup> But a disseisin, as the term is generally understood, is equivalent to ouster.<sup>5</sup> It of course does not mean actual violence; for it is obvious that, if a possession taken and held by literally resorting to force would operate in barring the right of the true owner, a breach of the peace, and a violation of public order, would then be made the foundation of a legal title.<sup>6</sup> Where the first possessor died, and a descent was cast, and the infant heirs were *driven* from the actual possession *by a public enemy*, the possession was considered, by the equity of the *jus postliminii*, as revested in the heirs, on the removal of the hostile force.<sup>7</sup> In a case where a stranger entered upon the land, and received the profits with the true owner, for more than twenty years, the words *actual ouster*, it appears, were used in reference to that circumstance, and to distinguish such an entry from an entry where the owner is put out of possession, and not as a general rule.<sup>8</sup> It was observed by Lord Mansfield, that some ambiguity seemed to have arisen from the term *actual ouster*, as if it meant some act accompanied by real force, and as if a turning-out

<sup>1</sup> 1 Burr. 107.

<sup>2</sup> *Prescott v. Nevers*, 4 Mason (Cir. Co.), 829. In this case Judge Story says: “I remember to have heard a learned judge (the late Chief Justice Parsons) say, that Lord Mansfield had gone to the bottom of this matter, and had puzzled himself unnecessarily. This observation attracted my attention at an early period of my professional life.”

<sup>3</sup> See note to *Howard v. Sherwood*, Al. & Nap. (Irish) Ex. 223.

<sup>4</sup> 8 Bl. Com. 167.

<sup>5</sup> *Preston on Abs. of title*, 388.

<sup>6</sup> *Jackson v. Porter*, Paine (Cir. Co.), 457. By the civil law, prescription could only run in favor of him who possessed “*neque clam, neque precario, et neque vi.*” See opinion of Master of the Rolls, in *Cholmondeley v. Clinton*, 2 Mer. Ch. 359. A claim made to land under color of right is an ouster; otherwise it is a mere trespass. *Ewing v. Burnet*, 11 Peters (U. S.), 41.

<sup>7</sup> *Smith v. Lorillard*, 10 Johns. (N. Y.) 338.

<sup>8</sup> *Doe v. Prosser*, Cowp. 217.

by the shoulders were necessary ; but that, he said, was not so. A man, he said, may come in by rightful possession, and yet hold over adversely without a title ; and, if he does, such holding over, under circumstances, would be equivalent to an actual ouster. For instance, he continued, length of possession under a particular estate, as a term of one thousand years, or under a lease for lives, as long as the lives are in being, gives no title ; but, if tenant *per autre vie* hold over for twenty years, such holding over will, in ejectment, be a complete bar to the remainder-man or the reversioner, because it was *adverse* to his title.

390. The difficulty in laying down a precise rule by which to determine what is an “adverse possession” is obvious from what has been said of disseisin and ouster, which mean very much the same as such possession ; and the difficulty, likewise, may be supposed from the unexampled sum total of litigation which has originated respecting it. The difficulty is not removed by saying, as has been said, that an adverse possession is a possession acquired by disseisin ; for a solution of the question, what constitutes a disseisin, by a very definite explanation, is no more easy. The clearest and most comprehensive definition of a disseisin and adverse holding, perhaps, is an actual, visible, and exclusive appropriation of land, commenced and continued under a claim of right,—either under an openly avowed claim, or under a constructive claim, arising from the acts and circumstances attending the appropriation, to hold the land against him who was seised.<sup>1</sup> To

<sup>1</sup> Mr. Smith, in his note to the case of *Taylor dem. Atkyns v. Horde*, 1 Burr. 60, says: “The doctrine of *adverse possession*, until very lately, constituted, and perhaps still constitutes, one of the least settled, although most important heads of English law. The difficulties which surrounded it seem to have had an origin subsequent to the abolition of a great proportion of the ancient tenures by St. 12, Car. 2, c. 24. Before that event, the difference seems to have been well understood between the sort of wrongful holding which would reduce the interest of the lawful owner to a right capable of being barred by the statute of limitations, and substitute the wrongdoer for him meanwhile as the representative of the freehold and the person responsible to the lord for feudal dues and services, and that species of unwarrantable possession which was accompanied by no such consequences. At all events, it is not till a comparatively modern period that we find any complaints about the difficulty of ascertaining what did or what did not constitute *adverse possession*. At last, however, this difficulty not only arose, but became so considerable, that, in *Taylor dem. Atkyns v. Horde*, so long the leading case upon this subject, we find Lord Mansfield saying, that ‘the precise definition of what constituted a *disseisin*, which made the disseisor the tenant to the demandant’s præcipe, though the right owner’s entry was not taken away, was once well known, but is not now to be found. The more

adopt the language of one of our State courts: "The principle on which the statute of limitations is predicated is not that the party

we read the more we shall be confounded.' The view taken by his lordship, in that case, is, that disseisin, at the common law, 'signified some mode or other of turning the tenant out of his tenure, and *usurping* his place and feudal relation;' an act which was accompanied by this consequence, namely, that if the disseisor died seised, the descent to his heir gave *him* the right of possession, and tolled or took away the true owner's entry. Co. Litt. 238 a, Litt. 426. This being the state of things at common law, the *assize of novel disseisin* was invented; which being found a beneficial remedy, but being applicable only to the case of a person *disseised*, a fiction grew up and was encouraged by the courts, according to which a party wrongfully out of possession, although not *disseised*, properly speaking, of the freehold, was permitted to treat the wrong done him as a disseisin for the sake of entitling himself to an assize. 'In a word,' says Lord Mansfield, '*for the sake of the remedy, as between the true owner and the wrong-doer to punish the wrong, and as between the true owner and naked possessor to try the title*, the assize was extended to almost every case of obstruction to an owner's full enjoyment of lands, tenements, and hereditaments.' This sort of supposed disseisin obtained the name of *disseisin at election*, for the purpose of distinguishing it from the other or *actual disseisin*, the consequences of which were widely different. For, after an *actual disseisin*, the disseisee could not devise or dispose of the lands, inasmuch as his interest was, by the disseisin, cut down to a right of entry which the policy of the old law against maintenance would not allow him to depart with; and further, if a descent was cast after a year, he lost his right of entry, and was put to his real action in order to reinstate himself. When St. 21 Jac. I. cap. 16, had passed, his condition became still worse; for, by that act, it was ordered, 'that no person shall make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title shall *first* descend or accrue to the same, except infants, *femes covert*s, persons *non compotes mentis*, imprisoned or beyond the seas, who shall have ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, to make their entry or claim in.' Previous to this, the claimant might have entered at any time, provided that his entry was not *toll*ed. Bevill's case, Co. 11 b. But this statute in twenty years barred the disseisee's entry in the same way that a descent cast barred it at the common law; and the right owner was, after that time, put to his real action, the period for commencing which had been before limited by St. 32 H. VIII. c. 1, and was, in the extreme case — that, namely, of a writ of right on the demandant's ancestor's own seisin — terminated at the expiration of sixty years from the time when the right first accrued which the writ was sued forth to recover. This statute, however, it is apprehended, only ran against the true owner in those cases in which he would, at common law, have been put out of his tenancy, and reduced to his right of entry; but not to cases in which he might have *elected* to consider himself *disseised*, although not really so, for the purpose of entitling himself to maintain an assize; and, consequently, whenever the question arose, whether a particular claimant was barred by having been twenty years out of possession, the mode of solving this question was by considering whether he had been out of possession under such circumstances as had reduced his interest to a *right of entry*; for, if he had, then, as that right of entry would be barred by St. 21 Jac. I. at the end of twenty years, the possession during the intermediate time was adverse to him. Now, in order to determine whether the claimant had been out of possession under circumstances which would turn his estate to a right of entry, it was necessary to inquire in what manner

in whose favor it is invoked has set up an adverse claim for the period specified in the statute, but that such adverse claim is accompanied by such invasion of the rights of the opposite party as to give him a cause of action, which having failed to prosecute within the time limited by law, he is presumed to have extinguished or surrendered: a mere claim of title, unaccompanied by adverse possession, gives no right of action to the person against whom it is asserted, and consequently his rights are unaffected by the statute.”<sup>1</sup> It is the occupation with an *intent* to claim against the true owner, as has been already stated,<sup>2</sup> which renders the entry and possession adverse. “It is not,” said Mr. Justice Thompson, “possession alone, but that it is accompanied with the claim of the fee, which, by construction of law, is deemed *prima*

the person, who had been in the possession during that time, held. See *Reading v. Royston*, Sal. 428. If he held in a character incompatible with the idea that the freehold remained vested in the claimant, then, as the case would arrange itself under some one of the heads disseisin, abatement, discontinuance, deforcement, or intrusion, all of which expressed, at common law, different modes of substituting a freeholder by wrong for one by right, so as to make the new-comer tenant to the lord and to a stranger’s *præcipe*, see 1 Roll. 659, &c.; Co. Litt. 277, and the note *ante*, p. 882, it followed that the possession in such character was adverse. But it was otherwise if he held in a character compatible with the claimant’s title. And, in order to ascertain in what character the person in possession held, the court would look at his conduct while in possession. See *Doe d. Grubb v. Grubb*, 10 B. & C. 816; *Smartle v. Williams*, 1 Salk. 246; *Williams v. Thomas*, 12 East, 141; *Doe v. Perkins*, 8 M. & S. 271; *Hall v. Doe d. Surtees*, 5 B. & A. 687; *Doe d. Foster v. Scott*, 4 B. & C. 706; *Doe d. Human v. Pettet*, 5 B. & A. 228; and *R. v. Axbridge*, 2 Ad. & Ell. 520. It is therefore apprehended that, at the time of the enactment of 3 and 4 W. IV. c. 27, the question, whether possession was or was not adverse, was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant. It is not intended to carry the discussion of this part of the subject much further, since the above statute has, as will be shown, rendered the doctrine of adverse possession of less importance, so far as claims of title founded upon twenty years’ enjoyment are concerned.” See *Smith’s Leading Cases*, vol. 2, p. 896; and 44 vol. of Law Library, p. 898. [And see also *Story v. Saunders*, 8 Humph. (Tenn.) 668; *Foxcroft v. Barnes*, 29 Me. (16 Shep.) 128; *Long v. Mast*, 11 Penn. St. (1 Jones) 189; *Taylor v. Burnsides*, 1 Gratt. (Va.) 169; *Overton v. Davisson*, 1 Ib. 211; *Towle v. Ayer*, 8 N. H. 57; *Kennedy v. Townley*, 16 Ala. 289; *Miller v. Platt*, 5 Duer. (N. Y.), 272. And the survey, allotment, and conveyance of a piece of land, and the recording the deed, does not constitute a disseisin, without any open occupation. *Thayer v. McLellan*, 10 Shep. (Me.) 417; *Tilton v. Hunter*, 11 Shep. (Me.) 29. And see also *Bailey v. Carleton*, 12 N. H. 9; *Nichols v. Todd*, 2 Gray (Mass.), 568; *Oatman v. Fowler*, 48 Vt. 402.]

<sup>1</sup> *Abell v. Harris*, 11 Gill & J (Md.) 871, per Dorsey, J. And see *Cooper v. Smith*, 9 Serg. & Rawle (Penn.), 26. [The acts must be such as indicate a claim of right in the soil. *Bartholomew v. Edwards*, 1 Houst. (Del.) 17.]

<sup>2</sup> See foregoing portion of the chapter.



*facie evidence* of such an estate.”<sup>1</sup> Indeed, that it is the *intention* to claim title which makes the possession of the holder of the land adverse, is the doctrine upon which the decision in every case proceeds. If it be clear that there is no such intention, there can be no pretence of an adverse possession.<sup>2</sup> Therefore, it has been held, that, if the owner of land, through inadvertency or ignorance of the dividing line, includes a part of an adjoining tract within his inclosure, it is not a possession adverse, or so in the nature of a disseisin, as to prevent the true owner from conveying and passing the same by deed.<sup>3</sup> Questions of adverse possession thus depending upon the intention of the possessor, and the knowledge, or the means of knowledge, on the part of the owner of the land, are questions of fact (as well as of law) to be determined by a jury, as the best means of ascertaining their truth. They are questions of law on which the court has a right to instruct the jury; and in finding the *quo animo*, the jury must, of course, be left to their own view of the effect of the evidence. This is the simple rule which seems to be established by the authorities; and all the difficulties consist in so arranging the facts as to apply the principles correctly.<sup>4</sup> Lord Mansfield says, “Disseisin is a fact to be found by a jury.”<sup>5</sup> But if the jury return a verdict, only that the defend-

<sup>1</sup> Jackson v. Porter, Paine (Cir. Co.), 457.

<sup>2</sup> See *ante*, as above.

<sup>3</sup> Brown v. Gay, 8 Greenl. (Me.) 126. [Gilchrist v. McLaughlin, 7 Ired. (N. C.) 810. And see *ante*, § 884 n.]

<sup>4</sup> Bradstreet v. Huntington, 5 Peters (U. S.), 402; La Frambois v. Jackson, 8 Cowen (N. Y.), 589. Presumptions are of two classes: natural and legal, or artificial. The natural presumption is, when a fact is proved, wherefrom, by reason of the connection founded on experience, the existence of another fact is directly inferred. The legal or artificial presumption is, where the existence of the one fact is not direct evidence of the other, but the one fact existing and being proved, the law raises an artificial presumption of the existence of the other. Per Ewing, Ch. J., in delivering the opinion of the court in Gulick v. Loden, 1 Green (N. J.), 68. As laid down by Spencer, J., in Smith v. Burtis, in New York, it has never been considered as necessary to constitute an adverse possession, that there should be a rightful title; and, whenever this defence is set up, the idea of right is excluded: the fact of the possession and the *quo animo* it commenced or continued are the only tests; and it must necessarily be exclusive of any other rights. Smith v. Burtis, 9 Johns. (N. Y.) 180.

<sup>5</sup> Taylor v. Horde, 1 Burr. 60. [Hall v. Dewey, 10 Vt. 598.] And see also Run-corn v. Cooper, 5 Barn. & Cress. 696. That the doctrine in this country is, that the question of adverse possession, as one of *intention*, ought to be left to the jury, see, in particular, Bradstreet v. Huntington, 5 Peters (U. S.), 402; Poignard v. Smith, 6 Pick. (Mass.) 172. Also the following cases: Jackson v. Joy, 9 Johns. (N. Y.) 102;



ant has held quiet possession of the demanded premises for more than twenty years, such verdict cannot, by legal intendment, be considered as establishing the alleged fact of disseisin.<sup>1</sup> In equity, of course, as well as at law, it may be shown, from circumstances, that the possession of the defendant ought or ought not to be considered as adverse.<sup>2</sup>

391. The jury have to consider that, to constitute complete possession in contemplation of law, requires an act of the body, accompanied with a will of the mind; that is, there must be a corporeal occupation, or a *possessio pedis*, as it is sometimes designated,<sup>3</sup> attended, as has been before mentioned, with a manifest intent to hold and continue it; and, when the intent plainly is to hold it against the claim of all other persons, the possession is

Jackson v. Stephens, 18 Ib. 496; Gayette v. Buthune, 14 Mass. 55; Jackson v. Porter, 1 Paine (Cir. Co.), 466; M'Clung v. Ross, 5 Wheat. (U. S.) 124; Cummings v. Wyman, 10 Mass. 468; Atherton v. Johnson, 1 N. H. 84; Jackson v. Jadwin, 9 Johns. (N. Y.) 102; Pray v. Pierce, 7 Mass. 383; Helm v. Howard, 2 H. & M'Hen. (Md.) 74; Seymour v. Delancy, 1 Hopk. (N. Y.) Ch. 449; Porter v. Dugut, 9 Mart. (La.) 92; Proprietors of Kenn. Purchase v. Springer, 4 Mass. 416; Mill Dam Corp. v. Bullfinch, 6 Mass. 229; Pray v. Price, 7 Mass. 391; Brown v. Porter, 10 Mass. 98; Warren v. Childs, 11 Mass. 222; Bolling v. Petersburg, 3 Rand (Va.), 563; Wallace v. Duffield, 2 S. & Rawle (Penn.), 527; Jackson v. Sharpe, 9 Johns. (N. Y.) 168; Jackson v. Waters, 12 Ib. 365; Jackson v. Thomas, 16 Ib. 293; Smith v. Burtis, 9 Ib. 174; Jackson v. Ellis, 18 Ib. 118; Jackson v. Wheat, 18 Ib. 40; Jackson v. Newton, Ib. 355; Bramdt v. Ogden, 1 Ib. 156; Kinsell v. Duggett, 2 Fairf. (Me.) 309; Schwartz v. Kuhn, 1 Ib. 274; Jackson v. Schoonmaker, 4 Johns. (N. Y.) 390; La Frambois v. Jackson, 8 Cowen (N. Y.), 603; Bracken v. Martin, 8 Yerg. (Tenn.) 55; Stephens v. Dewing, 2 Aik. (Vt.) 112; M'Nair v. Funt, 5 Mo. 300; Rogers v. Madden, 2 Batl. (S. C.) 321; Jones v. Porter, 3 Penn. 134; Malson v. Frye, 1 Watts (Penn.), 483; Bell v. Hurtle, 4 Watts & S. (Penn.) 82; Brown v. M'Kinney, 9 Whart. (Penn.) 567; Mercer v. Watson, 1 Watts (Penn.), 330; Overfield v. Christie, 7 S. & Rawle (Penn.), 172; Munshower v. Putton, 10 Ib. 334; Iler v. Heirs of Routh, 3 Miss. 276; Jones v. Porter, 3 Penn. 1341; Read v. Goodyear, 17 S. & Rawle (Penn.), 350; Hopkins v. Robinson, 3 Watts (Penn.), 205; Colburn v. Hollis, 3 Met. (Mass.) 125; Kinsell v. Daggett, 2 Fairf. (Me.) 309.

<sup>1</sup> Pejepscot Proprietors v. Nichols, 1 Fairf. (Me.) 256. *Semble*. [In Conyers v. Kenan (4 Ga. 308), it is made a query, whether every possession of the land of another is not *prima facie* adverse.]

<sup>2</sup> Wallace v. Duffield, 2 S. & Rawle (Penn.), 527. And see *ante*, Ch. III. [In South Carolina it has been held, that, where the possession is in fact adverse, the party so holding may set up the statute, although he may have practised deceit to lull the owner of the land into the belief that he did not intend to claim adversely. *Strange v. Durham*, 1 Brev. (S. C.) 83. And see *ante*, §§ 185, 186.]

<sup>3</sup> See opinion of Woodsworth, J., in Jackson v. Halstead, 5 Cowen (N. Y.), 219; and also the opinion of Kent, Ch. J., in Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230; Bailey v. Irley, 2 N. & M'Cord (S. C.), 343; King v. Smith, 1 Rice (S. C.), 10.

hostile, or adverse to the rights of the true owner. Such intent may be manifested by decided acts of ownership, such as, in a thickly settled country, digging stones or turves, as in England, with the occasional cutting of timber, which are conclusive evidence of a continued possession;<sup>1</sup> and so almost anywhere is actual improvement and cultivation of the soil, and the like.<sup>2</sup> Where one had driven piles into the soil, covered by a mill-pond, and upon them had erected and maintained buildings, — the water flowing between the piles, — it was adjudged to be a possession. And it was so adjudged, because such occupation was open and visible, and almost the only one which, under the circumstances of the subject of the occupation, could have existed to constitute a disseisin, or a complete exclusion of the possession of the demandants.<sup>3</sup> Building upon the land of another is constructive notice of an adverse claim.<sup>4</sup>

<sup>1</sup> Stanley v. White, 14 East, 332.

<sup>2</sup> Brandt v. Ogden, 1 Johns. (N. Y.) 156; Jackson v. Waters, 12 Ib. 365; Proprietors of Kennebec Purchase v. Springer, 4 Mass. 416; Small v. Proctor, 15 Ib. 496; Jackson v. Schoonmaker, 2 Johns. (N. Y.) 230; Hawke v. Senseman, 6 Serg. & Rawle (Penn.) 21; Jackson v. Porter, Paine (Cir. Co.), 467; Stanley v. White, 14 East, 332. Possession, once acquired, may be continued *solo animo*. Mackenzie's Law of Scotland, 111.

<sup>3</sup> Boston Mill Corporation v. Bullfinch, 6 Mass. 229.

<sup>4</sup> Jackson v. Warford, 7 Wend. (N. Y.) 62; Poignard v. Smith, 6 Pick. (Mass.) 172; Alden v. Gilmore, 1 Shep. (Me.) 178; Blood v. Wood, 1 Met. (Mass.) 528. [When an island which was subject to be overflowed, and to whose enjoyment no enclosure was necessary, was used by the defendant for pasturage whenever it was safe to use it, and this use was continuous, whenever it was safe, for twenty years, it was held to be such a possession as would bar any other claimant, though, as there had been no actual settlement upon the land, the statute of limitations of Kentucky, of seven years, would not apply. Webb v. Hynes, 9 B. Mon. (Ky.) 388. So the entering upon, ditching, and making roads, in a cypress swamp, for the purpose of getting shingles therein, and cutting down trees and making shingles therefrom, constitute an adverse possession. Tredwell v. Reddick, 1 Ired. (N. C.) 56. So building a shed, quarrying rock, and cutting wood for a lime kiln. Moore v. Thompson, 69 N. C. 120. And so, also do the keeping up fish-traps in a stream not navigable, erecting and repairing dams across it, and using it every year, during the entire fishing season, for the purpose of catching fish. Williams v. Buchanan, 1 Ired. (N. C.) 585. But see Jackson v. Lewis, Cheves (S. C.), 259. The entering upon unenclosed flats, when covered by the tide, and sailing over them with a boat or vessel, for the ordinary purposes of navigation, is not such an open, notorious, exclusive, and adverse possession as is necessary to constitute a disseisin. Drake v. Curtis, 1 Cush. (Mass.) 395. But the entering upon them and filling them up, or building a wharf and using the flats adjoining for laying vessels at the same, if the use be exclusive, would, it seems, constitute such a possession. Wheeler v. Stone et al., 1 Cush. (Mass.) 318. But see McFarlane v. Kerr, 10 Bosw. (N. Y.) 249. An entry upon a lot with a view

392. The occupation *must*, in fact, be visible and notorious, inasmuch as the statute, as has been heretofore several times stated, proceeds upon the ground that there has been an *acquiescence*, on the part of the owner of the land,—a ground of supposition which can never exist, if an occupation be so clandestinely taken as not to afford notice of the same. It is, therefore, incumbent on the person claiming land by virtue of possession, to show an actual occupation and appropriation of what he so claims, within some defined boundaries. One point, says Shaw, Ch. J., seems to be well settled, which is, that very strong acts of exclusive possession, such as building, enclosing, or cultivating, and that for a long time, and openly and notoriously, are necessary, in order to constitute an actual ouster of the true owner, who has no notice of such acts.<sup>1</sup> As was remarked by Mr. Justice Washington: “If

of taking possession of it under a claim of title, and marking the lines of it by spotting the trees around it, is a sufficient possession of it against one who can show no right of entry; although without an actual enclosure, it is not such an adverse possession, as against the real owner, as to bar his right under the statute of limitations. *Woods v. Banks*, 14 N. H. 101. The “Betterment Act,” of Maine, so far alters the common law, that a wood-lot, constituting part of a farm, may be subject to a *disseisin* by the occupant of the farm if used openly and notoriously for the purpose of cutting fuel and getting house-bote therefrom. *Tilton v. Hunter*, 11 Shep. (Me.) 29. But yearly, for a few weeks at a time, getting rails and other timber from land, though only valuable for timber, does not constitute an adverse possession. *Bartlett v. Simmons*, 4 Jones (N. C.), Law, 295. Nor does cutting logs, for four years, by the owner of a saw-mill, from an unenclosed pine lot, for the mill, making roads for hauling the logs, and for several years more cutting light-wood and fire-wood. *Watts v. Griswold*, 20 Ga. 782. And see also *Washabaugh v. Entriiken*, 86 Penn. St. 518; *Hole v. Ritterhouse*, 87 Ib. 116; *Long v. Young*, 28 Ga. 180. The plaintiffs and defendants were owners of adjacent parcels of land. The wall of the building erected upon the land of the former was some inches from the dividing line, the interval being used by the occupants as a drain and passage-way until within ten years of the commencement of the suit, when its outlet was closed by them. The foundation of the building on the defendants’ land extended underground the whole width of the strip to the foundation of the plaintiffs’; the easterly wall of the former premises also extended across the inner end of the passage-way, and, as well as the westerly wall, which, at some seven feet above the ground, was carried over the outlet of the drain, and the roof, which extended over it, abutted against the wall of the plaintiffs’ building. Held, that these facts did not constitute an adverse possession of the strip in question, on the part of the defendants. *Miller v. Platt*, 5 Duer (N. Y.), 272. The acts of the parties, and the situation and mode of use of the premises cannot be controlled by evidence that the claimant did not understand that he was acquiring any interest in the *locus in quo*. *Voorhies v. Burchard*, 6 Lan. N. Y. S. C. 176. And see also, as to what constitutes adverse possession, *Weber v. Anderson*, Sup. Ct. Ill. 7 Ch. Leg. News, 196.]

<sup>1</sup> *Blood v. Wood*, 1 Met. (Mass.) 528.

the right of one who enters, or retains possession, by wrong, can never extend beyond the limits of the particular spot to which his occupation is confined, there would exist no other to circumscribe his claim.”<sup>1</sup> In the language of the Supreme Court of New York, “Adverse possession must be marked by definite boundaries, and be regularly continued down, to render it availing.”<sup>2</sup> The principle that a *wrongful* possession, however visible and notorious it may be, cannot be extended beyond visible and definite bounds, was applied, in the State of New Hampshire, in a case where R. entered upon a tract of land upon the *east* side of a river, claiming the whole, previously to the entry of J. on the opposite side. The *naked* possession of R., it was held by the court, though accompanied by a claim to the land on both sides, did not, in law, amount to a possession of the land *west* of the river.<sup>3</sup> The possession claimed, in this case, to be extended to the west of the river, was so completely secret, that it existed *only* in the mind and imagination of the actual occupant of the land on the east side of the river. A continued residence on the land is not, however, necessary; it being sufficient that the land has been enclosed, and used in such a manner as to give publicity to the possession.<sup>4</sup> Making improvements, or receiving the rents for a considerable length of time, would be sufficient, without residence.<sup>5</sup> In the case of a dwelling-

<sup>1</sup> Potts v. Gilbert, 8 Wash. (Cir. Co.) 475. See also Hall v. Powell, 4 Serg. & Rawle (Penn.), 456; Munshower v. Patten, 10 Ib. 884; Mickle v. Lucas, Ib. 298; Brandt v. Ogden, 1 Johns. (N. Y.) 156; Hapgood v. Burt, 4 Vt. 155; Wood v. Grundy, 3 H. & Johns. (Md.) 18.

<sup>2</sup> Doe v. Campbell, 10 Johns. (N. Y.) 477.

<sup>3</sup> Riley v. Jameson, 8 N. H. 23. [And see also Bishop v. Lee, 8 Barr (Penn.), 214. Adverse possession of the bank of a stream is not constructively possession to the middle. Corning v. Troy Company, 84 Barb. (N. Y.) 529.] But one is not estopped from setting up a title by adverse possession in a lot of land extending beyond the thread of the river, acquired *subsequently* to his taking a deed bounded by the river. Kinsell v. Daggett, 2 Fairf. (Me.) 309.

<sup>4</sup> Johnson v. Irvine, 8 Serg. & Rawle (Penn.), 291; Jackson v. Howe, 14 Johns. (N. Y.) 405; Doe v. Thompson, 5 Cowen (N. Y.), 871; Doe v. Campbell, 10 Johns. (N. Y.) 475; Gonzalus v. Hoover, 6 Serg. & Rawle (Penn.), 291; Farley v. Lennox, 8 Ib. 892; Davidson v. Beatty, 8 Harr. & McHen. (Md.) 595; Smith v. Middletown, 1 Ib. 521; Brown v. Porter, 10 Mass. 98; Kennebec Purchase v. Springer, 4 Ib. 416; Barr v. Gratz, 4 Wheat. (U. S.) 218; Hawke v. Senseman, 6 Serg. & Rawle (Penn.), 21; Miller v. Shaw, Ib. 129. An open visible possession of fifty years, and this known to those who had the legal title, without any attempt to assert it, was held to be conclusive evidence of disseisin. Boston Mill Dam Corporation v. Bullfinch, 6 Mass. 229. [Notoriety is of no moment, if the owner knows that the possession is adverse. Clark v. Gilbert, 89 Conn. 94.]

<sup>5</sup> Cummings v. Wyman, 10 Mass. 464. Where a person, without title, took pos-

house in a city, the possession of it continues, so as to give the possessor the benefit of the statute of limitations, although the house may not have been occupied all the time by himself, or by a succession of tenants under him, without intermission; and direct proof of occupancy during the whole period is not necessary.<sup>1</sup>

893. The occupation of land up to a fence on each side of a town lot is incontestably such a possession, as, if continued, will, after the expiration of the time prescribed by the statute, bar the right of entry of him occupying on the other side of the fences, whether the fence be on the right line or not.<sup>2</sup> An occupation amounting to a possession may be assumed by the protruding *eaves* of the roof of a building. Thus, if a person erect a dwelling-house near the line of his land, with eaves, not far enough from the line of his land to allow for eaves-droppings on his own land, it will be regarded as an appropriation of the land directly beneath the eaves, and, as such, a possession thereof; and, if this be prior to any cultivation, or other actual use of the adjacent land, it is a prior occupation and possession. If the owner of the adjacent land afterwards cultivates the land quite up to the line of the building, and under its eaves, it cannot be regarded as a disturbance or interruption of the possession already taken by the owner of the building, because it is not inconsistent with the only use which he has had occasion to make, and has been actually making, of the land, by his eaves.<sup>3</sup> So, on the other hand, if a conterminous proprietor encloses, or otherwise uses, land, up to a certain line which he claims as his boundary line, this will be regarded as a prior occupation and possession up to that line, as against the other owner, who subsequently erects a building on that line, with eaves overhanging the land thus enclosed or used.<sup>4</sup>

session of land which was under mortgage, and built on parts of it a carpenter's shop and blacksmith's shop, and the tenants of the carpenter's shop occasionally used parts of the lot adjacent to their shop to spread their boards on, and the tenants of the blacksmith's shop used other parts of the lot to run carriages on, and put tires on wheels, — it was held that this was a disseisin of the mortgagee only for the parts of the land covered by the shops. *Poignard v. Smith*, 8 Pick. (Mass.) 272.

<sup>1</sup> *Mackentile v. Savoy*, 17 Serg. & Rawle (Penn.), 104.

<sup>2</sup> *Brown v. McKinney*, 9 Whart. (Penn.) 567; *Burrell v. Burrell*, 11 Mass. 296. [Clarke v. Tabor, 2 Wms. (Vt.) 222; *Robinson v. Phillips*, 65 Barb. (N. Y.) S. C. 418.]

<sup>3</sup> [And see *Mims v. Wetherbee*, 2 Strobb. (S. C.) 184; *post*, § 415, *sub finem*; *Perkins v. Dunham*, 2 Strobb. (S. C.) 224.].

<sup>4</sup> Opinion of the court, by Shaw, Ch. J., in *Thacker v. Gardiner*, 7 Met. (Mass.) 404.

394. The rule as to what will amount to a possession sufficient to bar the right of entry, or to confer a title, is more strict, where the country is old and populous, than it is where lands are in a state of nature, like those in the United States which lie in what is called the "Western country," and those in the Eastern States which lie removed from settlements. Land, thus remotely situate, is purchased frequently with the view of retaining it in an uncultivated state, until it can be disposed of to advantage; and sometimes the original purchaser from the government, when disposed to sell, may not, for many years, meet with an opportunity.<sup>1</sup> "In the simplicity of ancient times," says Mr. Justice Story, in giving the opinion of the Supreme Court of the United States, "there was no means of ascertaining titles but by the visible seisin; and, indeed, there was no other mode, between subjects, of passing title, but livery of the land itself, by the symbolical delivery of turf and twig. The moment that a tenant was thus seised, he had a perfect investiture; and, if ousted, could maintain his action in the realty, although he had not been long enough in possession even to touch the esplees. The very object of the rule, therefore, was notoriety, to prevent frauds upon the land and upon other tenants. But, in a mere uncultivated country, in wild and impenetrable woods, in the sullen and solitary haunts of beasts of prey, what notoriety could an entry, a gathering of a twig or an acorn, convey to civilized man, at the distance of hundreds of miles? The reason of the rule could not apply to such a state of things; and "cessante ratione, cessat ipsa lex." We are entirely satisfied that a conveyance of wild or vacant lands gives a *constructive* seisin thereof, indeed, to the grantee, and attaches to him all the legal remedies incident to the estate. *A fortiori*, this principle applies to a patent; and, upon any other construction, infinite mischief would result."<sup>2</sup> In the case of *Barr v. Gratz*, in the same court,<sup>3</sup> the principle was broadly established, that, when an entry is made without title, the disseisin is limited to the actual occupancy; and that a patent issued, by operation of law, vests the constructive actual possession in the patentee.<sup>4</sup> The rule of law, says Mr. Jus-

<sup>1</sup> *Johnston v. Irwin*, 3 Serg. & Rawle (Penn.), 291. [*Draper v. Short*, 25 Mo. (4 Jones) 197.]

<sup>2</sup> *Green v. Liter*, 8 Cranch (U. S.), 229.

<sup>3</sup> *Barr v. Gratz*, 4 Wheat. (U. S.) 213.

<sup>4</sup> The courts of Kentucky, having decided that an entry was required to give title



tice Spencer, of the Supreme Court of the State of New York, which requires a seisin in fact, must be applied, in that State, with such a limitation as the peculiar state of lands in this country requires; and *to consider the possession as following the ownership*, in the case of wild and unimproved lands, was no departure from the spirit and substance of the English law.<sup>1</sup> In North Carolina, the statute of limitations does not apply to any vacant lands;<sup>2</sup> in Maryland, a patent alone is held to be sufficient evidence to support an ejectment;<sup>3</sup> and, in South Carolina, where there are interfering claims to a tract of land, the rule of law is, that the possession shall be adjudged to be in him who has the right.<sup>4</sup> In Missouri, a New Madrid certificate is held sufficient to maintain an ejectment, with a copy of the survey of the land.<sup>5</sup> To constitute, says Chief Justice Parsons, of the Supreme Court of Massachusetts, a disseisin of the owner of uncultivated lands, by entry and the occupation of the land by a party not claiming title, the occupation must be of that nature and notoriety, that the owner may be presumed to know that there is a possession of the land; otherwise, a man may be disseised without his knowledge, and the statute

on a military warrant, in the military district, the Supreme Court of the United States have decided that the legislative grant of Virginia to her officers and soldiers does not, of itself, prevent the statute of limitations of Kentucky from attaching. *Porterfield v. Clark*, 2 How. (U. S.) 76. A confirmation of title to land, by Congress, is a higher evidence of title than a patent, *because* it is a direct grant of the fee which had been previously in the United States. *Grignor's Lessee v. Astor*, 2 How. (U. S.) 819. An ejectment cannot be maintained on a warrant, without a survey or purchase-money paid. *Vanhorn v. Chesnut*, 2 Wash. (Cir. Co.) 160. Nor with survey alone. *Milligan v. Dickson*, 1b. 258; *Copley v. Riddle*, 1b. 854; *Dubois v. Newman*, 4 Ib. 74. Actual, exclusive, and uninterrupted adverse possession of mining lands, for the statutory period, gives title under the State law, notwithstanding the act of Congress of 1872, c. 91, § 7, in relation to the location of mining claims, and the determination of rights thereto in case of conflict. *The 420 M. Co. v. Bullion M. Co.* 9 Nev. 240.

<sup>1</sup> *Jackson v. Howe*, 14 Johns. (N. Y.) 405. [*Singles v. Hastings*, 22 N. Y. (8 Smith) 217.] By the party who is constructively seised, *pedis possessio* is not necessary. Per Kent, Ch. J., in *Jackson v. Sellick*, 8 Ib. 262. See also *Brandt v. Ogden*, 1 Ib. 156; *Jackson v. Schoonmaker*, 2 Ib. 280; *Jackson v. Bosburg*, 9 Ib. 270; *Jackson v. Newcomb*, 1b. 100; *Jackson v. Hogeboom*, 11 Ib. 162; *Wickham v. Freeman*, 12 Ib. 188; *Thorp v. Burling*, 11 Ib. 285.

<sup>2</sup> *Anon.*, 1 Hay. (N. C.) 466.

<sup>3</sup> *Savary v. Whayland*, 1 Harr. & McHen. (Md.) 206.

<sup>4</sup> *Sims v. Meacham*, 2 Bail. (S. C.) 101.

<sup>5</sup> 1 Mo. 884. [*Gray v. Givens*, 26 Mo. (5 Jones) 291. But no length or kind of adverse possession, prior to the issue of a United States patent, will avail against the patentee. *Gibson v. Chouteau*, 18 Wall. (U. S.) 92. But see *Hammond v. Coleman*, Cir. Ct. St. Louis Co. Mo. May, 1875, 2 C. L. J. 859.]



of limitations run against him, while he has no ground to believe that his seisin has been interrupted.<sup>1</sup> In another case in that State, a survey was held to give to the owner such possession as would support an action of trespass, though he might elect to be disseised, and bring his ejectment; yet the act of the wrongful entry does not amount to a disseisin.<sup>2</sup> With regard to what are called "back" lands, in Pennsylvania, it has ever been found, according to Chief Justice Tilghman, expedient to establish it as a principle, that the owner is in actual possession, though neither he, nor any under him, be actually residing on the land.<sup>3</sup> A contrary notion has been derived by settlers from the nature of the "improvement title" of that State, and it has by them been generally supposed, that a wrong-doer, entering on "unseated" lands, may acquire a constructive possession of whatever he could hold as an improver, if the land was actually vacant, and, for that purpose, might avail himself of the survey of the owner, or establish a boundary of his own; and that, in either case, he will be considered in the constructive possession of all the land thus included. This the courts consider decidedly wrong; for a constructive possession is an incident of ownership, and results from title, and is in no way applicable to a case where the occupant defends himself avowedly and exclusively on the ground of his own wrong.<sup>4</sup> Mere intruders are no less allowed, in Ohio, to question the validity of a patent, under which the plaintiff claims.<sup>5</sup> This is the proper application of the

<sup>1</sup> *Proprietors of Kennebec Purchase v. Skinner*, 4 Mass. 416.

<sup>2</sup> *Ibid. v. Call*, 1 Mass. 484.

<sup>3</sup> *Miller v. Shaw*, 7 Serg. & Rawle (Penn.), 129.

<sup>4</sup> See opinion of Mr. Justice Gibson, in *Miller v. Shaw*, 7 Serg. & Rawle (Penn.), 137. In Pennsylvania, an actual settler cannot support ejectment. The jury must decide whether an actual settler, who is deterred from completing his settlement by a junior settler, intends to abandon or not. *Cosfrey v. Brown*, 2 Binn. (Penn.) 124. A settler east of the Alleghany River, in the old purchase, who has defined the limits of his survey, and marked his claim on the ground, may recover without a survey. *Luck v. Duff*, 6 Serg. & Rawle (Penn.), 189. Actual settlers are entitled to a preference over mere claimants. *Bayard v. McInnes*, Addis. (Penn.) 292. A possession under a Connecticut title of land in Pennsylvania, for the time limited by the statute of the latter State, is a bar to a recovery by one having the Pennsylvania title. *Barney v. Sutton*, 2 Watts (Penn.) 87. [But see *post*, § 411.]

<sup>5</sup> *Holt v. Hemphill*, 8 Ohio, 232. [Occupation of wild and unenclosed land by cutting firewood and bushes and trimming the trees thereon, and, in one instance within twenty years, by cutting off the entire growth of wood, gives no title by adverse possession, though within the knowledge of the owner. *Parker et al. v. Parker*, 1 Allen (Mass.), 245.]

statute, by which "men, in many instances, are made secure in the enjoyment of their property, which, it may be truly said, in the wild and uncultivated parts of the State, they have *bought*, not merely by the sweat of their brow, but with their blood, as well as with their money."<sup>1</sup> This is also considered the proper application in North Carolina.<sup>2</sup>

395. The right thus drawing to it the possession of the owner *per se*, he thus remains possessed, until disseised by a wrong-doer, whose occupation must be strictly *possessio pedis*.<sup>3</sup> Actual, visible, and substantial *enclosure* is decisive proof of such disseisin, and also of the *limits* of it.<sup>4</sup> But it must be a real and substantial

<sup>1</sup> Kennedy, J., in *Sailor v. Hertzog*, 4 Whart. (Penn.) 259. And see also *Burns v. Swift*, 2 Serg. & Rawle (Penn.), 486.

<sup>2</sup> *Slade v. Smith*, 1 Hay. (N. C.) 248; *McMillan v. Hafley*, 1 Ired. Dig. 231. Where the party claiming possession has never, in contemplation of law, been out of possession. *Gay v. Moffit*, 2 Bibb (Ky.), 508; *Bryant v. Allen*, 2 Hay. (N. C.) 74; *Symonds v. Blood*, Ib. 235; *Taylor v. Shield*, 5 Litt. (Ky.) 296; *Clay v. White*, 1 Munf. (Va.) 162; See *v. Greenhorn*, 6 Ib. 803; *Gibson v. Martin*, 1 H. & Johns. (Md.) 545; *Taylor v. Buckner*, 2 Marsh. (Ky.) 19; *Andrews v. Mulford*, 1 Hay. (N. C.) 320.

<sup>3</sup> *Jackson v. Howe*, 14 Johns. (N. Y.) 405; *Johnson v. Irwin*, 8 S. & Rawle (Penn.), 291.

<sup>4</sup> *Miller v. Shaw*, 7 Serg. & Rawle (Penn.), 129; *Cluggage v. Duncan*, 1 Ib. 111. Also in *Burns v. Swift*, Ib. 486; *Munshower v. Patten*, 10 Ib. 884; *Farley v. Lenox*, 8 Ib. 892; *Mercer v. Watson*, 1 Watts (Penn.), 880; *Hawk v. Senseman*, 6 Serg. & Rawle (Penn.), 21. To the same effect was the opinion of the General Court of Maryland, in *Ringold's Lessee v. Cheney*, 4 Hall's Law Jour. 128; and in the Court of Appeals of Maryland, it was declared by the court that "where one claims by possession alone, without showing any title, he must show an exclusive possession by *enclosure*, and his claim cannot extend beyond this enclosure." *Davidson's Lessee v. Baker*, 8 H. & McHen. (Md.) 621. Also *Hammond v. Warfield*, 2 H. & Johns. (Md.) 156; *Smith v. Hosmer*, 7 N. H. 486; *Watrous v. Southworth*, 5 Conn. 806. [*Hatch v. Vt. Central Railroad*, 28 Vt. 142; *Bell v. Longworth*, 6 Ind. 278. And an enclosure on three sides by a wrong-doer is insufficient as against the real owner. *Armstrong v. Risteau*, 5 Md. 256. A ledge of rocks may be equivalent to a fence. *St. Louis v. Gorman*, 29 Mo. (8 Jones) 593.] Where a defendant, in an action of ejectment, was in possession of *an hundred* acres by enclosure and cultivation for fifteen years, and enlarged his enclosure so as to include *one hundred and fifty* acres, and he possessed the same, so enlarged, for six years thereafter, claiming the same as his own, it was held that he had a title by his adverse possession to a hundred acres only. *Hull v. Gittings*, 2 H. & Johns. (Md.) 391. [*Goewey v. Wrig*, 8 Ill. 238.] Where land was claimed by actual possession and enclosure in fences, and was bounded on one side by a pond, and on the other side by other lands, to which the claimant had good title, though his fences did not in fact surround the land in question on all sides, except that next the pond, yet it was properly left to the jury to determine whether they were erected for the purpose of enclosing the land in controversy, or merely for the protection of his own. *Dennett v. Crocker*, 8 Greenl. (Me.)

enclosure.<sup>1</sup> It was held, in the State of New York, that a "possession fence," as it is called (which means an enclosure formed by the lapping of fallen trees), that in 1774 embraced the township of Rochester, in that State, did not create a possession which would toll the right of entry of him who had the legal title after twenty years; it being evidence too loose and equivocal.<sup>2</sup> It has been held, in New Hampshire, that enclosing land by a *brush fence*, and cutting wood from a wood-lot where a person has no color of title, is also not such evidence of exclusive possession as will warrant the presumption of a grant.<sup>3</sup>

396. Cattle ranging, it has been held in North Carolina, is not such a possession as is calculated to give notice to the adverse claimant under a grant that the land is occupied and claimed by another;<sup>4</sup> and neither is overflowing land, by stopping a stream below, or cutting timber.<sup>5</sup> Occasional exercises of dominion, by

239. Land thus situated, being about to be sold, the claimant declared to the intended purchaser that he held it by possession, warning him not to buy a quarrel; but it was held that these declarations, unaccompanied by any act of ownership, did not constitute a disseisin, nor change the character of the previous enclosure by fences. Ibid. Where a person, under whom the defendant claimed, was a commissioner appointed under the authority of the State, for the sale of vacant lots, and, in 1812, took possession of the lot in question, and fenced it in, and, in 1815, sold the lot, as commissioner, and the next day took a conveyance to himself from the purchaser, it was held that the time limited by the statute began to run from his entry by enclosure in 1812. *Parker v. Southwick*, 6 Watts (Penn.), 877. [Under a conveyance of part of an entire tract, defined by metes and bounds, the part conveyed being described by the number of acres to be set off by a line to be thereafter run, the statute will not begin to run until the line is run, or until there has been an actual undisturbed possession so long as to create a legal presumption that the division has taken place. *Hindsman v. Worthen*, 22 Ga. 47. An obstruction of part of a space over all which A claims a right of way by adverse user does not defeat A's right to pass over the way as reduced in width. *Putnam v. Bowker*, 11 Cush. (Mass.) 542.]

<sup>1</sup> *Kincaid v. Louge*, 7 Mo. 166; *Robinson v. Douglas*, 2 Aik. (Vt.) 364. Possession must be visible and definite in Kentucky, 4 Bibb, 544; 1 Marsh. 59, 506; 5 Litt. 22.

<sup>2</sup> *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230. Lapping fallen trees together, no possession. *Colburn v. Hollis*, 3 Met. (Mass.) 125.

<sup>3</sup> *Hale v. Gliddon*, 10 N. H. 897.

<sup>4</sup> *Andrews v. Mulford*, 1 Hay. (N. C.) 811. [But clearing and cultivating new fields, turning out old ones, when worn out, and cutting wood promiscuously, is such a possession. *Wallace v. Maxwell*, 10 Ired. (N. C.) 110. So is building a shed, quarrying rock, and cutting wood for a lime kiln. *Moore v. Thompson*, 69 N. C. 120.]

<sup>5</sup> Though making *turpentine* possibly may. *Green v. Harman*, 4 Dev. (N. C.) 158. In Tennessee, cultivation alone of part of the defendant's claim, not within the bounds of the disputed part, is not sufficient possession. *Napier's Lessee v. Simpson*, 1 Tenn. 448. And see also Hay. (Tenn.) 63. [*Mims v. Wetherbee*, 2 Strobb. (S. C.) 184; *Buckholder v. Sigler*, 7 Watts & Serg. (Penn.) 154.]

broken and unconnected acts of ownership over property, which may be permanently productive, is considered as in no respect calculated to assert to the world a claim of right; "for such conduct bespeaks rather the fitful invasions of a conscious trespasser than the confident claims of a rightful owner."<sup>1</sup> In Kentucky, the settlement required by the statute of limiting suits against actual settlers is a settlement and residence on the land; and clearing and cultivating the land is not sufficient.<sup>2</sup> In Louisiana, digging a canal and felling trees are not such acts of possession as are the basis of prescription.<sup>3</sup> Payment of taxes alone, though it may extend the limits of a possession, does not constitute it; and there must accompany it an actual occupancy of, at least, a part of the land.<sup>4</sup>

397. But payment of taxes, in connection with certain other facts and circumstances which are notorious, and are strongly indicative of ownership, may amount to an actual possession in fact, which will run against the constructive actual possession of the owner, without the fact of enclosure. For instance, if the owner acknowledged himself to be out of possession of the unenclosed and unimproved lands, and suffer the claimant to pay taxes upon it, or the like.<sup>5</sup> Where a survey was made, which included the entire tract, and the boundaries of the tract were distinctly marked on the ground, and A conveyed to the defendant, who built a house and saw-mill, and cleared a few acres of ground; and continued to claim possession of the whole tract within the limits of the survey for more than the time prescribed by the statute, and had paid taxes upon the whole, and from it cut timber for the use of the saw-mill, — it was held, that the defendant had acquired a title

<sup>1</sup> Per Ch. J. Tayler, in *Jones v. Ridley*, 2 N. C. Law, 400. [*Ewing v. Alcorn*, 40 Penn. St. 492.]

<sup>2</sup> *Hoy v. Perry*, 1 Litt. (Ky.) 171; *Skyles's Heirs v. King's Heirs*, 2 Marsh. (Ky.) 885. See also 3 Marsh. 183, 615. Most certainly the occasional cutting of timber on land does not amount to possession. *Smith v. Mitchell*, 1 Marsh. (Ky.) 207. And see also *Ib.* 106; 3 *Ib.* 366.

<sup>3</sup> *McCarty v. Fourcher*, 12 Mart. (La.) 11. [And see also *Watts v. Griswold*, 20 Ga. 732.]

<sup>4</sup> *Sorber v. Willing*, 10 Watts (Penn.), 142; *Naglee v. Albright*, 4 Whart. (Penn.) 291. [*Ewing v. Burnett*, 1 McLean (U. S.), 286; *Reed v. Field*, 15 Vt. 672; *Chapman v. Templeton*, 58 Mo. 468. But the payment of taxes is evidence of a claim and of its extent. *Hockenburgh v. Snyder*, 2 Watts & Serg. (Penn.) 240; *Draper v. Shoot*, 25 Mo. (4 Jones) 197; *Cornelius v. Giberson*, 1 Dutch. (N. J.) 1.]

<sup>5</sup> *Royer v. Benlow*, 10 Serg. & Rawle (Penn.), 808. [*Farrar v. Fessenden*, 39 N. H. 268.]

by virtue of the statute, to all within the lines of the survey.<sup>1</sup> If an intruder enters, and settles upon an unseated tract of land, claims it as his own, by exercising acts of ownership over it, from year to year, in putting up buildings, clearing and fencing more or less of it, and using the whole according to the custom of the country, namely, the cleared land, either as arable, meadow, or pasture, and the woodland for obtaining from it timber, as often as he shall have occasion for it to answer his purpose, and returning the whole of it to the assessors as his own, and paying the taxes as assessed, during the whole period limited by the statute, — all this, it has been held, in Pennsylvania, will be sufficient to protect him on the whole tract or survey, including the woodland as well as the improved parts of it.<sup>2</sup> An intruder will be protected after the expiration of the time limited by the statute, not only in that which he has cultivated and enclosed, but also in all which may be made useful and advantageous as the part of the farm without being enclosed, and which he has used as a part of the farm in that way; and hence, woodland, in a reasonable quantity, may be protected, if there be any intent shown by the occupier, to designate it as a part of the farm.<sup>3</sup>

398. All the above authorities bring us to the starting-point, namely, that, as a general rule, facts and conduct on the part of a person exercising acts of ownership, and claiming, adversely, title and possession, would amount, in law, to possession of the land and disseisin, if known and acquiesced in by him who has the right, when, if unknown and not acquiesced in by such party, they would not amount to such possession and disseisin, but only to successive trespasses; and that the question is for the determination of the jury.<sup>4</sup> The doctrine of the Supreme Court of the United States is, that, to constitute an adverse possession, there *need* not be a fence, building, or other improvement made; and that it suffices for this purpose, that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by the statute. That much depends upon the nature

<sup>1</sup> *Heiser v. Richel*, 7 Watts (Penn.), 85. And see *Call v. Neely*, 8 Ib. 69. [*Murphy v. Springer*, 1 Grant (Penn.), 78. But this constructive possession may be restricted by the acts and declarations of the occupant, showing that he does not make his title equally extensive with the survey. *Brown v. Edson*, 22 Vt. 357.]

<sup>2</sup> *Criswell v. Altemus*, 7 Watts (Penn.), 580.

<sup>3</sup> *Lawrence v. Hunter*, 9 Watts (Penn.), 64.

<sup>4</sup> See the case of *Robinson v. Sweet*, 8 Greenl. (Me.) 815.

and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it. That it is difficult to lay down any precise rule in all cases ; but that it may with safety be said, that, where acts of ownership have been done upon land, which, from their nature, indicate a notorious claim of property in it, and are continued sufficiently long, with the knowledge of an adverse claimant, without interruption, or an adverse entry by him, — such acts are evidence of an ouster of a former owner, and an actual adverse possession against him ; provided, the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. That neither actual occupation, cultivation, or residence is necessary to constitute actual possession, when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim.<sup>1</sup>

399. The possession must, however, in all cases, continue the same in point of *locality*, during the period of time prescribed as sufficient to bar the right of entry ; and a roving possession, from one part of a tract of land to another, will not bar the right of the owner upon any part of the land which has not been continuously held during the time prescribed, although the different periods of possession of the separate parcels should amount in the whole to the time prescribed. The location of the parcel occupied must be shown, that it may be seen whether the continuity of possession during the whole period was applicable to it.<sup>2</sup>

400. There is an obvious and important distinction to be observed between possession taken, as in the above cases, by a mere *intruder*, and a possession taken by a person under a *colorable title*. It is, that the possession of the former is confined, and has been shown, to the land actually in occupation ; whereas, the possession

<sup>1</sup> Ewing v. Burnett, 11 Peters (U. S.), 53 ; Ellicott v. Pearl, 10 Ib. 442 ; Barclay v. Howell's Lessee, 6 Ib. 513. [Langworthy v. Myers, 4 Iowa, 18 ; Conway v. Kinsworthy, 21 Ark. 9. And statutes giving title by possession will not be so construed as to give a title where the facts do not show affirmatively that all the elements requisite to the possession fairly exist ; and negatively that there is no element fatal to the validity of the possession. Sydnor v. Palmer, 29 Wis. 226.]

<sup>2</sup> Potts v. Gilbert, 8 Wash. (Cir. Co.) 475. [Griffith v. Schwenderman, 27 Mo. (6 Jones) 412.]



of the latter is construed to be coextensive with the premises as described by the deed or will under which he claims, and which he believes gives him a sound title. The rule has been stated by Mr. Justice Thompson, in the Circuit Court of the United States, to be unquestionable, that, where one enters into land under a conveyance, his seisin is not bounded by his actual possession, but is coextensive with his title; but, where he enters without title, his seisin is confined to his possession by metes and bounds.<sup>1</sup> Mr. Justice Story, likewise, in the Circuit Court of the United States, took it to be a clear principle of law, "that, where a person enters into land under a claim of title thereto by a recorded deed, his entry and possession are referred to such title; and that he is deemed to have a seisin of the land coextensive with the boundaries stated in his deed, where there is no open adverse possession of any part of the land so described, in any other person."<sup>2</sup> "The erection of a fence," say the Supreme Court of the United States, "is nothing more than an act presumptive of an intention to assert an ownership and possession over the property. But there are many other acts, which are equally evincive of such an intention of asserting such ownership or possession; such as entering upon land, and making improvements thereon, raising a crop of corn, felling and selling the trees thereon, &c., under color of title. An entry into possession of a tract of land, *under a deed containing specific metes and bounds*, gives a constructive possession of the whole tract, if not in any adverse possession, although there may be no fence or enclosure round about the ambit of the tract, and an actual residence only on a part of it."<sup>3</sup> In another case, say the same court, there need not be a fence, building, or other improvement made; and that it suffices that visible and notorious acts of ownership are exercised over the premises in controversy, after an entry under claim and color of title.<sup>4</sup>

<sup>1</sup> *Jackson v. Porter*, 1 Paine (Cir. Co.), 457. [*Bynum v. Thompson*, 3 Ired. (N. C.) 578; *Webb v. Sturtevant*, 1 Scam. (Ill.) 181; *Lovett v. Noble*, Ib. 186; *Shackleford v. Smith*, 5 Dana (Ky.), 232; *Kyle v. Tubbs*, 23 Cal. 481; *Welbon v. Anderson*, 87 Miss. (8 George) 155; *Ware v. Johnson*, Sup. Ct. Mo. Feb. 1874.]

<sup>2</sup> *Prescott v. Nevers*, 8 Mason (Cir. Co.), 880. And see also *Potts v. Gilbert*, 8 Wash. (Cir. Co.) 475. [*Johnson v. McMillan*, 1 Strobb. (S. C.) 148; *Fitzrandolph v. Norman*, 2 Tayl. (N. C.) 181.]

<sup>3</sup> *Ellicott v. Pearl*, 10 Peters (U. S.), 412.

<sup>4</sup> *Ewing v. Burnett*, 11 Peters (U. S.), 41. Under the act of the legislature of Tennessee of 1797, to explain an act of the legislature of North Carolina of 1715, a



401. The doctrine is as clearly settled by the State courts, that, in cases where the tenant enters under a claim or color of title, he is to be regarded with more favor than a mere naked disseisor, and as entitled to all the land within the limits prescribed by the written conveyance under which he claims. In the State of Louisiana, an individual put in possession, by metes and bounds, acquired, by possession of a part of the tract of land, a title to the whole.<sup>1</sup> In the State of New York, if a man purchases and takes a deed of a whole parcel of land, supposing that he obtained a title to the whole, although it subsequently appears that the grantor owned but a small portion, the possession under such deed, being under color of title, is adverse as to the other proprietors, as to the whole parcel.<sup>2</sup> Where a corporation received a grant of land from the crown of Great Britain, in 1705, and immediately, by virtue thereof, claiming title to the whole of the granted premises, as against the whole world, and continued such adverse possession under claim for sixty years, it was held in the same State, that such corporation acquired a perfect title to the premises covered by the grant, as against the original rightful owner.<sup>3</sup> The distinction above mentioned is thus, with much clearness, stated by

possession of *seven* years is a bar, only when held under a grant, or a deed founded on a grant. The judges and lawyers of North Carolina had been much divided on the construction of this act; some maintaining that, like other acts of limitation, it protects mere naked possession, and others contending that its operation was confined to a possession acquired and held by color of title. It was finally determined, in the Supreme Court of North Carolina, that the act of 1715 afforded protection to those only who held under color of title. The contest was maintained in Tennessee, after its separation from North Carolina; and, under the act of 1797, it has been recognized by the Supreme Court of the United States as being decided, in Tennessee, that a possession of *seven* years is a bar, only when held under a grant, or a deed founded on a grant. *Patton's Lessee v. Eaton*, 1 Wheat. (U. S.) 476; *Powell v. Harman*, 2 Peters (U. S.), 241.

<sup>1</sup> *Sanchez v. Gonzalez*, 11 Mart. (La.) 207. And see *Prevost's Heirs v. Johnson*, 9 Ib. 123.

<sup>2</sup> *Jackson v. Smith*, 18 Johns. (N. Y.) 406. If a person has constructive possession by color of title, and occupying a part, another person cannot acquire a constructive possession to the same extent, in the same manner; but, though the latter enters on part, with color of title to the whole, his possession will be confined in extent to the part which he actually occupies. *Jackson v. Vermilyea*, 6 Cow. (N. Y.) 677.

<sup>3</sup> *Bogardus v. Trinity Church*, 4 Paige (N. Y.), Ch. 178. The law of adverse possession, in New York, in respect to an entry and possession under color of title, is now clearly defined by the act of limitations. See Appendix, lix., lx. Where a defendant in ejectment, in New York, produced no written title, but relied solely on possession, with claim of title, he could retain so much only as he had under actual improvement and cultivation. *Jackson v. Warford*, 7 Wend. (N. Y.) 62.

Parsons, Ch. J., in delivering the opinion of the Supreme Court of Massachusetts: "When a man enters on land, claiming a right and title to the same, and acquires a seisin by his entry, his seisin shall extend to the whole parcel; for, in this case, an entry on part is an entry on the whole. When a man not claiming any right or title to the land shall enter on it, he acquires no seisin but by the ouster of him who was seised; and, to constitute an ouster of him who was seised, the disseisor must have the actual, exclusive occupation of the land, claiming to hold it against him who was seised."<sup>1</sup> Whoever enters under a deed of land in New Hampshire enters claiming according to his deed; and, if the deed be defective, and nothing pass under it, it may be evidence both of the extent and character of the occupation.<sup>2</sup> It has been held, also, in Vermont, that if the defendant prove, that he, or those under whom he derived title, purchased the whole of the lot demanded, under a paper title, and takes possession under such title, he will hold the whole, under the statute of limitations, although the possession be taken by occupying and improving one acre, when the paper title gives several acres.<sup>3</sup> The same construction has been irrevocably settled in South Carolina, since the case of *Reid v. Eibert*.<sup>4</sup> And so the doctrine seems to be considered by the courts in the States generally.<sup>5</sup> The rule is the same

<sup>1</sup> *Proprietors of Kennebec Purchase v. Springer*, 4 Mass. 416. And see also *Higbee v. Rice*, 5 Ib. 844; *Sparhawk v. Bullard*, 1 Met. (Mass.) 95; *Poignard v. Smith*, 8 Pick. (Mass.) 272.

<sup>2</sup> *Waldron v. Tuttle*, 4 N. H. 871; *Lund v. Parker*, 8 Ib. 49; *Riley v. Jameson*, Ib. 23. And see *Gibson v. Bailey*, 9 Ib. 168. [*Gage v. Gage*, 10 Foster (N. H.), 420.]

<sup>3</sup> *Pearsall v. Thorp*, 1 Chip. (Vt.) 92.

<sup>4</sup> *King v. Smith*, 1 Rice (S. C.), 14; *Reid v. Eibert*, reported in a note to 1 N. & M'Cord (S. C.), 374.

<sup>5</sup> *Hawkins v. Robinson*, 3 Watts (Penn.), 205; *McCall v. Neely*, Ib. 70; *Hall v. Powell*, 4 Serg. & Rawle (Penn.), 456; *Bell v. Hartley*, 4 Watts (Penn.), 82; *Cheney v. Ringold*, 3 H. & Johns. (Md.) 87; *Lloyd v. Gordon*, 2 H. & McHen. (Md.) 254; *Grant v. Winbourne*, 2 Hay. (N. C.) 56; *Stanley v. Turner*, 1 Murph. (N. C.) 14; *Bowman v. Bartlett*, 3 Marsh. (Ky.) 99. [*Bowie v. Brake*, 3 Duer (N. Y.), 85.] (If a settler in Kentucky, taking possession, under one claim, accidentally intrude, he acquires no interfering possession out of his actual close. *Smith v. Morrow*, 5 Litt. (Ky.) 210. And see also 1 Marsh. (Ky.) 460.) *Kincaid v. Louge*, 7 Mo. 176; *Brooks v. Clay*, 3 Marsh. (Ky.) 260; *Ridgley's Lessee v. Ogle*, 4 H. & McHen. (Md.) 129. [*Saxton v. Hunt*, 1 Spencer (N. J.), 487; *Noyes v. Dyer*, 25 Me. (12 Shep.) 468; *Waggoner v. Hastings*, 5 Barr (Penn.), 800; *Kite v. Brown*, Ib. 291; *Bank of the State v. Smyers*, 2 Strobb. (S. C.) 24; *Crowell v. Pebee*, 10 Vt. 83; *Chiles v. Conley*, 9 Dana (Ky.), 885; *Alston v. Collins*, 2 Speers (S. C.), 460; *Hubbard v. Austin*, 11 Vt. 129; *Porter v. McGinnis*, 1 Penn. St. 418; *Cline's Heirs v. Catron*, 22 Grat.

if a person, who originally entered without claim, afterwards obtain a colorable title; and from the period when he does obtain it, the adverse possession commences.<sup>1</sup>

402. Where there is no interference of surveys, possession of part is, in law, possession of the whole; but where surveys interfere, the statute has no operation against him who has the best right, except his opponent takes an *adverse* and exclusive possession.<sup>2</sup> An ancient location adjacent to the land demanded, by a description in a deed between third persons, though unaccompanied by any open and notorious possession, will govern the line of the demanded premises; unless the party objecting can prove that the line ought to have been laid out in a different direction.<sup>3</sup> A possession of part may be adverse as to the whole, although the occupier does not know that there is an owner; as in the case of the possession of public land sold by the State, and supposed to be vacant, but which, in point of fact, had been sold by the State.<sup>4</sup> Where one entered upon part of a tract of land, under a deed of the whole from one having no title, and afterwards received a deed from the *disseisee* of a larger part of the same tract, it was

(Va.) 378. But the constructive possession of land arising from title cannot be extended to that part of it whereof there is an actual adverse possession, whether with or without a paper title. *Tredwell v. Reddick*, 1 Ired. (N. C.) 56; *Stevens v. Hollister*, 18 Vt. (8 Washb.) 294; *Griffith v. Schwenderman*, 27 Mo. (6 Jones) 412. Nor will a subsequent conflicting possession in lands be extended, by construction, beyond the limits of the actual adverse possession, for the purpose of defeating a prior constructive possession. *Ralph v. Bagley*, 11 Vt. 521. Nor will a deed give color of title beyond the estate which it purports to pass. *McRae v. Williams*, 7 Jones (N. C.), Law, 480; *Thompson v. Cragg*, 24 Texas, 582; *Craig v. Goodman*, 22 N. Y. 170; *McEvoy v. Loyd*, 81 Wis. 148.]

<sup>1</sup> *Jackson v. Thomas*, 16 Johns. (N. Y.) 298. [There can be no constructive adverse possession against the owner, when there has been no actual possession which he could treat as a trespass, and bring suit for. *Steadman v. Hilliard*, 3 Rich. (S. C.) 101. And see also *Slice v. Derrick*, 2 Rich. (S. C.) 627; *Gorndin v. Davis*, *ib.* 481.]

<sup>2</sup> *Burns v. Swift*, 2 Serg. & Rawle (Penn.), 489. [*Altemus v. Trimble*, 9 Barr (Penn.), 282; *Thompson v. Milford*, 7 Watts (Penn.), 442; *Fitch v. Mann*, 8 Barr (Penn.), 508; *Criswell v. Altemus*, 7 Watts (Penn.), 566; *Taylor v. Cox*, 2 B. Mon. (Ky.) 429; *Beaupland v. McKeen*, 28 Penn. St. 124; *Waddle v. Stewart*, 4 Sneed (Tenn.) 584; *Franklin Acad. v. Hall*, 16 B. Mon. (Ky.) 472. And see also *McGowan v. Crooks*, 5 Dana (Ky.), 65; *Chiles v. Jones*, 7 *ib.* 528; *Hatch v. Smith*, 4 Barr (Penn.), 109; *McDonald v. Schneeder*, 27 Mo. (6 Jones) 405; *Creech v. Jones*, 5 Sneed (Tenn.), 681; *Schultz v. Lindell*, 30 Mo. (9 Jones) 810. Enclosing and cultivating part of the interference, and using the residue as adjacent woodland is customarily enjoyed, is actual possession of the whole. *Ament v. Wolf*, 1 Grant (Penn.), 518.]

<sup>3</sup> *Sparhawk v. Bullard*, 1 Met. (Mass.) 95.

<sup>4</sup> *Jones v. Porter*, 3 Penn. 184; *Swaney v. McCulloch*, 8 Watts (Penn.) 845.

held by the court to be a question for the consideration of the jury, whether the disseisor did not *intend* thereby to yield and abandon his possessory title to the whole tract, on thus obtaining a perfect title to a large part of it.<sup>1</sup>

403. But the doctrine of the constructive adverse possession of lands, held under color of title, by the cultivation of part, accompanied by a claim of the whole under a deed, it has been considered must be taken with some reference to the nature of the locality of the lands. That the doctrine is strictly applicable to a single lot of land, or to a single farm, there can be no doubt; but, in respect to land so held and not purchased with a view of actual cultivation, the case is obviously a different one. The reason and propriety of a distinction between the two cases were attentively considered and thus strongly urged by Woodworth, J., in giving the opinion of the court in *Jackson v. Woodruff*, in the State of New York:<sup>2</sup> "The doctrine of adverse possession, applied to a farm or single lot of land, is, in itself, reasonable and just. In the first place, the quantity of land is small. Possessions, thus taken, under a claim of title, are, generally, for the purpose of cultivation and permanent improvement. It is, generally, necessary to reserve a part for woodland. Good husbandry forbids the actual improvement of the whole. The possessions are usually in the neighborhood of others; the boundaries are marked and defined. Frequent acts of ownership in parts not cultivated give notoriety to the possession. Under such circumstances, there is but little danger that a possession of twenty years will be matured against the right owner; if it occasionally happens, it will arise from a want of vigilance and care in him who has title. It is believed that no well-founded complaint can be urged against the operation of the principle; but the attempt to apply the same rule to cases where a large tract is conveyed would be mischievous indeed. Suppose a patent granted to A, for two thousand acres; B, without title, conveys one thousand of the tract to C, who enters under the deed, claiming title, and improves one acre only; this inconsiderable improvement may not be known to the proprietor, or, if known, is disregarded for twenty years. Could it be gravely urged, that here was a good adverse possession to the one thousand acres? If it could, I perceive no reason why the deed from B to C might

<sup>1</sup> *Schwartz v. Kuhn*, 1 Fairf. (Me.) 274.

<sup>2</sup> *Jackson v. Woodruff*, 1 Cow. (N. Y.) 286.

not include the whole patent, and, after the lapse of twenty years, equally divest the patentee's title to the whole; for there would exist an actual possession of one acre, with a claim of title to all the land comprised in the patent. No such doctrine was ever intended to be sanctioned by the court. If the doctrine contended for prevails, it would sanction this manifest absurdity, that a possession under Platt's deed, which conveyed no title, would, as to its legal effect, be more beneficial than a possession taken under the proprietors of Friswell's patent, where there is not only title, but a good constructive possession, in consequence of the grant, and actual occupancy and improvement of a part." It was decided in this case, that where A held land under a patent, and B held under another patent, of land adjoining; and in the location under their respective patents, A, by mistake in locating, curtailed his patent on the side of B, in consequence of which, B (although he located at first on the true line) afterwards claimed up to A's location, and conveyed a supposed gore between the patents; A was not concluded in an action of ejectment, but might recover against any one claiming a part of the supposed gore under the title of B.<sup>1</sup>

404. As to what constitutes color of title, it seems to be very well agreed, that, if the title under which the party relying on possession claims, and originally entered, be ever so defective, the possession is, notwithstanding, adverse.<sup>2</sup> The doctrine of

<sup>1</sup> And see *Ten Eyck v. Richards*, 6 Cow. (N. Y.) 628. [*Hunter v. Chrisman*, 6 B. Mon. (Ky.) 468. In Vermont this doctrine of constructive possession applies only to land taken possession of for the ordinary purposes of cultivation and use, and not to a case where a few acres are taken possession of in an uncultivated township, for the mere purpose of thereby gaining a title to the entire township. *Chandler v. Spear*, 22 Vt. (7 Washb.) 888. And in this State it has been held that cutting a road upon land with a view to get timber, or to fell trees in order to clear and cultivate land, constitute, in connection with a written claim of title, a constructive possession of the whole tract described. *Spear v. Ralph*, 14 Vt. 400.]

<sup>2</sup> *Jackson v. Todd*, 2 Caines (N. Y.), 183; *Jackson v. Sharp*, 9 Johns. (N. Y.) 162; *Jackson v. Waters*, 12 Ib. 365; *Jackson v. Thomas*, 16 Ib. 298; *Jackson v. Wheat*, 18 Ib. 40; *Jackson v. Newton*, Ib. 365. [*Roberts v. Pillow*, 1 Hemp. 624. Where one is in possession of land, claiming title under and pursuant to a state of facts which of themselves show the character and extent of his claim, such facts perform sufficiently the office of color of title. *Bell v. Longworth*, 6 Ind. 278; *Doe v. Heareck*, 14 Ind. 242. Color of title is any thing in writing connected with the title which serves to define the extent of the claim. *Wales v. Smith*, 19 Ga. 8. Any deed, though unrecorded, purporting to convey title, no matter on what founded, is color of title. *Lea v. Polk Co. Copper Co.*, 21 How. (U. S.) 498; *Dickinson v. Breeden*, 80 Ill. 279. Or how defective. *Hunna v. Renfro*, 82 Miss. (8 George) 125. But a grant of land

adverse possession was subjected to very critical disquisition, in a case in the New York Court of Errors, in 1826; and it was held that though the possessor claims under written evidence of title, and, on producing that evidence, it prove to be defective, yet the character of his possession, as adverse, is not affected by the defects of his title; and, if the entry be under color of title, the possession will be adverse, however groundless the supposed title may be.<sup>1</sup> So it has been held, that, if a grantee enter under a

which has been adjudged null and void, and in effect recalled and cancelled in a competent tribunal, gives no color of title. *Marsh v. Weir*, 21 Texas, 97. And a bond signed by "A as agent" gives no color of title to A. On the contrary, it is a disclaimer of title by him. *Simmons v. Lane*, 25 Ga. 178. And that color may be given without any writing, and may commence in trespass. *McLellan v. Kellogg*, 17 Ill. 498. And a *bond fide* claim by color of title is not disparaged by the claimant's knowledge that the boundary lines are uncertain and the title disputed. *Cornelius v. Giberson*, 1 Dutch. (N. J.) 1.] An adverse possession for the time limited under a claim or color of title, merely void, is a bar to a recovery under an elder title by deed, although the adverse holder may have had notice of the deed. *Ewing v. Burnet*, 8 Peters (U. S.), 41. "A vendee in fee derives his title from the vendor; but his title, though derivative, is adverse to that of the vendor. He enters and holds for himself, and not for the vendor." Such was the doctrine of the Supreme Court of the United States, in *Blight's Lessee v. Rochester*, 7 Wheat. 585. "If this be the correct doctrine of this court," say the court in another case, "and there can be no doubt it is, it seems to follow that, wherever the proof is, that one in possession holds for himself, to the exclusion of all others, the possession so held must be adverse to all others, whatever relation, in point of interest or privity, he may stand in to the others." *Bradstreet v. Huntingdon*, 5 Peters, 440. See also *Willison v. Watkins*, 8 Ib. 58.

<sup>1</sup> *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589. [*Mitchell v. Persons Unknown*, 59 Mo. 448. A sheriff's deed, without producing the judgment and execution, is sufficient to give color of title. *Riggs v. Dooley*, 7 B. Mon. (Ky.) 236; *Northrop v. Wright*, 7 Hill (N. Y.), 476; *North v. Hammer*, 84 Wis. 425; *Hester v. Coats*, 22 Ga. 56; *Brien v. Sargent*, 13 La. An. 108. But such a deed will take effect only from the date of its execution, and will not relate to the times of the sale. *Blount v. Robeson*, 8 Jones, Eq. (N. C.) 78. And so does a deed from a collector of taxes. *Hearick v. Doe*, 4 Ind. 164; *Sutton v. McLoud*, 26 Ga. 688; *Baily v. Doolittle*, 24 Ill. 577. Not, however, if defective on its face. *Sydnor v. Palmer*, 29 Wis. 256. An unrecorded quitclaim deed of all a grantor's title under a collector's deed, though the collector's deed conveyed no interest, is color of title. *Minot v. Brooks*, 16 N. H. 374. So does the deed of an attorney who has no authority to convey. *Hill v. Wilson*, 2 Murphy (N. C.), 14. See also *Farrow v. Edmondson*, 4 B. Mon. (Ky.) 605; *Munro v. Merchant*, 28 N. Y. (1 Tiffany) 9. And a deed, founded on a void or voidable decree in chancery, gives a colorable title. *Whiteside v. Singleton*, 1 Meigs (Tenn.), 207. And a deed by one tenant in common of the whole estate in common to a third person. *Ross v. Dewham*, 4 Dev. & Batt. (N. C.) 54; *Weisinger v. Murphy*, 2 Head (Tenn.), 674. And a deed by an infant gives a colorable title and possession adverse to the infant. *Murray v. Shanklin*, 4 Dev. & Batt. (N. C.) 289. So possession of land under a grant from the State is possession under color of title, and adverse, even where the grant is void for irregularity, if the tenant enters under it in good faith. *Moody v. Fleming*, 4 Ga. 115.



deed not executed in conformity to law, and believing the title to be good, the possession of such grantee cannot in strictness be said to be held in subordination to the title of the legal owner; that the possession is taken by the grantee as owner, and because he claims to be owner, and the grantor admits that he is owner. The grantor may claim, and reassert his title, because he has not conveyed his estate according to law, and thus regain possession; but, until he does this by entry or by action, or by making a lease to a third person, the possession is adverse, and, accordingly, at the end of the period of limitation, takes away the right of entry and of action.<sup>1</sup> Proof of the execution, acknowledgment, and delivery of a defective deed of conveyance, and possession of the land for several years by the grantee, has been held sufficient to render the deed competent in law to pass such an estate to the grantee as will enable his heir in tail to recover in ejectment.<sup>2</sup> If the party in possession, claiming under a deed, and supposing there was a defect in the title, applies to purchase the title of a person claiming the same premises, for the purpose of strengthening only, or quiet-

Where A purchases under an execution against B, takes a deed, and, on the same day, conveys to B, though the purchase and conveyance be at the request of B, and no money is paid, B has a colorable title. *Rogers v. Mabe*, 4 Dev. (N. C.) 180. See also *Dobson v. Erwin*, 4 Dev. & Batt. (N. C.) 201; *Tubb v. Williams*, 7 Humph. (Tenn.) 367. A will gives color of title; but a paper purporting to be a will, which has but one subscribing witness, and which has never been proved as a will, does not. *Callendar v. Sherman*, 5 Ired. (N. C.) 711. A defective deed taken in good faith, though the defect is apparent on its face, gives color of title. *Edgerton v. Bird*, 6 Wis. 527. But property sold by an intestate to his son, of which the possession is held by the wife, who is administratrix, the son living in the family, is not held by him adversely to the intestate's creditors. *Snodgrass v. Andrews*, 30 Miss. (1 George) 472. And the sale by an administrator of the land of his solvent intestate under a license of the probate court gives color of title if accompanied by a deed from the administrator. *Livingston v. Pendergast*, 34 N. H. 544. Though the deed be void as against heirs for want of notice. *Vancleve v. Miliken*, 18 Ind. 105. A mortgage under a purchase at a foreclosure sale, though the sale prove to be invalid, has color of title. *Chickering v. Failes*, 26 Ill. 507.]

<sup>1</sup> *Sumner v. Stephens*, 6 Met. (Mass.) 337; *Barker v. Salmon*, 2 Ib. 32; *Parker v. Proprietors of Locks and Canals, &c.*, 3 Ib. 91; *Pipher v. Lodge*, 16 Serg. & Rawle (Penn.), 214. And see *Knox v. Hook*, 12 Mass. 329. [*Macklot v. Dubreuil*, 9 Mo. 477. Otherwise in Kentucky. *Gray v. Patton*, 2 B. Mon. (Ky.) 12.]

<sup>2</sup> *Brashear v. Hewitt*, 4 Harr. & McHen. (Md.) 222. In Tennessee, color of title is where the possessor has a conveyance of some sort by deed or will or inheritance, which he may believe to be a sound title. *Wilson, &c.*, 4 Hay. (Tenn.) 182. And see also 5 Ib. 286. In North Carolina, there must be an instrument not obviously defective, professing to pass the title. *Dobson v. Murphey*, 1 Dev. & Batt. (N. C.) 586. A sheriff's return upon a *fi. fa.* is sufficient to give color of title. *Ibid.*



ing, his own title, it is not an abandonment of his own title, nor an admission of a superior title in another.<sup>1</sup> Repeated applications of the defendant, however, to purchase of the plaintiff the premises in question, will afford a presumption that he entered by permission of the plaintiff, and not claiming adversely to him.<sup>2</sup> Deeds, though *fraudulent* on the part of the grantor, if accepted *bona fide* by the grantee, and without knowledge of the fraud, give a color of title under the statute of limitations.<sup>3</sup>

405. To give color of title, as has been laid down by Gibson, Ch. J., would seem not to require the aid of a written conveyance, or a recovery by process and judgment. He would say that an entry is by color of title when it is made under a *bona fide*, and not a pretended claim to a title existing in another.<sup>4</sup> Therefore, if, on an agreement for the sale of land, the *consideration is paid*, the owner consents that the buyer may enter and hold the land as his own; and the entry and possession of the buyer cannot be deemed subordinate to the title of the seller, but as adverse and a disseisin.<sup>5</sup> Where A, having contracted to purchase lands of B, paid part of the purchase-money, but titles were never made, and

<sup>1</sup> *Jackson v. Newton*, 18 Johns. (N. Y.) 855. [Nor is a defendant in ejectment estopped to claim title under the statute of limitations by the fact that he has taken out a warrant for the land, and fixed a period for the commencement within twenty-one years before suit brought. *Graffins v. Tottenham*, 1 Watts & Serg. (Penn.) 488. And see also *Northrop v. Wright*, 7 Hill (N. Y.), 476.]

<sup>2</sup> *Jackson v. Creal*, 18 Johns. (N. Y.) 116. [But in a late case in Missouri, it was held that the acceptance of a deed is not such a recognition of the vendor's title as to estop the vendee from setting up the statute of limitations. *Blair v. Smith*, 1 Ben. (Miss.) 273.]

<sup>3</sup> *Gregg v. Sayre*, 8 Peters (U. S.), 244. [A purchaser of land sold for taxes does not acquire a possession upon which he can rely to sustain a claim under the statute of limitations. *Cranmer v. Hill*, 4 Watts & Serg. (Penn.) 86. Otherwise in Arkansas, where there has been a subsequent undisturbed possession of five years. *Pillow v. Roberts*, 18 How. (U. S.) 472.]

<sup>4</sup> *McCall v. Neely*, 8 Watts (Penn.), 72.

<sup>5</sup> *Brown v. King*, 5 Met. (Mass.) 173. [*Ellison v. Cathcart*, 1 McMullan (S. C.), 5; *Pendergrast v. Gullatt*, 10 Ga. 218; *Drew v. Towle*, 10 Foster (N. H.), 531; *Paxson v. Bailey*, 17 Ga. 600; *Lander v. Rounseville*, 12 Texas, 195; *McQueen v. Ive*, 86 Ala. 808; *Magee v. Magee*, 37 Miss. (8 George) 188. But see *Roxbury v. Huston*, 37 Me. (2 Heath) 42. But it has been held, in Ohio, that possession under a contract of sale cannot become adverse to the vendor, while the purchaser is claiming the benefit of the contract, and making payments upon it. *Woods v. Dille*, 11 Ohio, 455. But it may, if he refuse, after a conveyance to him, to make further payments according to contract, and assert to the vendor his own absolute title. *Robertson v. Wood*, 16 Ark. 1. And see also *Bank of the State v. Smyers*, 2 Strobb. (S. C.) 24.]

A gave the land to his son C, who went into possession, the possession of the latter, it was held, was adverse both as to A and B ; and it was also held, that declarations made by A, subsequently to the gift to C, that he did not hold adversely to B, were inadmissible in an action by C against B.<sup>1</sup>

406. But the case is different, where one agrees to buy and another agrees to sell land, and *no* consideration is paid, and the party contracting to buy enters into possession ; inasmuch as the fair inference then is, that the entry and possession are in subordination to the title of the party contracting to sell, until the stipulated payment is made. Such a case, therefore, constitutes a tenancy at will, or a trust, rather than a disseisin.<sup>2</sup> The statute of limitations of Pennsylvania -is inapplicable to an action of ejectment, brought to enforce the unpaid purchase-money for lands of the early proprietaries within the manors for which warrants had issued. Very extensive indulgence was given for the purchase-money, and the practice was to hold back the title ; and there were facts which went to demonstrate the general opinion to be, that, so long as this state of things continued, the title to the land was still in the proprietary, and so acknowledged to be. The proprietary permitted the purchaser to hold the land, subject to the claim of the purchase-money ; and the purchaser held the land, under the admission that the land remained liable to the purchase-money, and that the proprietary might, at any distance of time,

<sup>1</sup> *Hunter v. Parsons*, 2 Bail. (S. C.) 59. The plaintiff, in an action of ejectment offered to prove that the person under whom he claimed had purchased and paid for the land in question, and had been many years in possession of it ; but it did not appear that any deed had been given. It was held that such person had no legal title to the land, and that the plaintiff could derive none from him. *Eells v. Day*, 4 Conn. 95.

<sup>2</sup> *Brown v. King*, *supra* ; *Woods v. Bliss*, 11 Ohio, 455. [*Van Blarcom v. Kip*, 2 Dutch. (N. J.) 351 ; *Stamper v. Griffin*, 20 Ga. 812 ; *Gudger v. Barnes*, 4 Heisk. (Tenn.) 570, overruling *Ray v. Goodman*, 1 Sneed (Tenn.), 589.] It has been held, in Maryland, that, where a contract for the sale of land is proved, and a uniform possession of part under it, length of time is no bar to a specific performance being decreed. *Somerville v. Trueman*, 4 Harr. & McHen. (Md.) 43. [*Ripley v. Yale*, 18 Vt. (3 Washb.) 220 ; *Stansbury v. Taggart*, 8 McLean (U. S.), 457 ; *Fuller v. Van Geesen*, 4 Hill (N. Y.), 171 ; *Appleby v. Obert*, 1 Harr. (Del.) 886. But, in New York, a lapse of thirty or, it seems, of twenty years, it is said, will authorize a jury to presume a deed from the original vendor. *Maltonner v. Dimmick*, 4 Barb. (N. Y.) S. C. 566. And in Georgia, where there was a bond for a deed on the payment of the purchase-money, the possession of the purchaser was held to be adverse. *Fain v. Garthright*, 5 Ga. 6.]

assert his title to it, so far, at least, as to secure the purchase-money. There was in fact a mutual understanding and a mutual confidence between the parties; so that the purchaser could not be considered as holding a possession adverse to the title which he acknowledged.<sup>1</sup> The same principle has been recognized in South Carolina. A went into possession of land under a conditional agreement to purchase, and executed his notes for the purchase-money, the first payable on or before the first day of January subsequent to the date of the contract, the second on or before the first day of January thereafter; and it was stipulated between the parties that in case of failure to make payment in twenty days after the money became due, the land, with all its improvements, was to revert back to the vendor, his heirs or assigns; but, if payment was made, then warrantee titles were to be made to the purchaser. A continued in possession, cultivating and improving the land, until September after the first note became due on which suit had been brought, without any intimation that his occupancy was contrary to the will of the vendor. It was held by the court that he was to be regarded as tenant for the year.<sup>2</sup>

407. In *Jackson v. Rogers*, in New York,<sup>3</sup> it was held that a *parol gift* of land creates only a tenancy at will; and that, if the tenant at will makes a lease for years, it is no disseisin, unless the true owner elect to make it so, nor does it destroy the capacity of the true owner to devise. But, in *Sumner v. Stephens*,<sup>4</sup> decided in Massachusetts as lately as 1843, it was held that where one enters upon land, claiming title, such possession is adverse, and,

<sup>1</sup> *Kirk v. Smith*, 9 Wheat. (U. S.) 241. And see *Penn v. Klyne*, 1 Wash. (Cir. Co.) 207; *Hurst v. Durnell*, Ib. 262; *Con et al. v. Penn et al.*, Peters (Cir. Co.), 662.

<sup>2</sup> *Fowke v. Beck*, 1 Spear (S. C.), 291 (Co. of Appeals). That a possession and claim of land, under a mere executory contract of purchase, is not such an adverse possession as will bar an entry. *Wilkinson v. Nichols*, 1 Monroe (Ky.), 46; *Richardson v. Broughton*, 2 Nott & McCord (S. C.), 417; *Proprietors of No. 6 v. McFarland*, 12 Mass. 325. And see *Marvin v. Hotchkiss*, 6 Cow. (N. Y.) 401. [The possession of land by a purchaser under a bond for a deed, to be delivered before a part of the purchase-money became due, is not adverse until the day appointed for the conveyance of the title. *Ormond v. Martin*, 1 Ala. (S. C.) 526.]

<sup>3</sup> *Jackson v. Rogers*, 1 Johns. (N. Y.) Cas. 36. The court, by Sutherland, J., in *Jackson v. Whitbeck*, 6 Cow. (N. Y.) 688, left a claim of title under a *parol gift*, as laying the foundation of an adverse possession, undetermined.

<sup>4</sup> *Sumner v. Stephens*, 6 Met. (Mass.) 337. [See also *School Dist. v. Blakesbee*, 13 Conn. 227; *Moore v. Webb*, 2 B. Mon. (Ky.) 282; *contra*, *Watson v. Tindal*, 24 Ga. 494.]

if continued for twenty years, bars the owner's right of entry and of action. A grant, sale, or gift of land by parol, says Chief Justice Shaw, is void by the statute; but, when accompanied by an actual entry and possession, it manifests the intent of the donee to enter, and not as tenant; and it equally proves an admission, on the part of the donor, that the possession is so taken. It would be the same, if the grantee should enter under a deed not executed conformably to the statute, but which the parties by mistake believe good. The court did not use the term "disseisin," because its accurate definition and description has been the subject of much discussion; and because the term is equivocal, and the same facts may prove a disseisin, for some purposes and in some respects, and not in others. It was enough for the decision of the case that the tenant had the actual exclusive and adverse possession of the estate more than twenty years, by which the owner, and all persons claiming under him, were barred of their entry and right of action.<sup>1</sup>

408. Where a deed is relied on as giving color of title, contains no description of the land, although it is of no moment that the title is defective, yet, if no land is described, nothing can pass; and, therefore, such a deed can never lay the foundation of an available adverse possession beyond the actual improvement.<sup>2</sup>

409. Color of title merely, or without open and notorious occupation of some part, is not a disseisin,<sup>3</sup> though, by the ancient doctrine, a simple feoffment had a more large and transcendent operation. Before the case of *Taylor ex dem. Atkyns v. Horde*,<sup>4</sup> it seems to have been the settled doctrine, that a feoffment would create an estate of freehold in the feoffee, although none was in the feoffor at the time of the feoffment. But the decision in that case and others subsequent have very much broken in upon this ancient doctrine as to the efficacy of a simple conveyance to work a disseisin where the grantor is not seised.<sup>5</sup> "The good sense and

<sup>1</sup> [Possession by a donee under a parol gift is adverse to the donor. *Clark v. Gilbert*, 39 Conn. 98. And see also *Steel v. Johnson*, 4 Allen (Mass.), 425; *Outcalt v. Ludlow*, 82 N. J. 289.]

<sup>2</sup> *Jackson v. Woodruff*, 1 Cow. (N. Y.) 276. [*Little v. Downing*, 87 N. H. 355; *Gudger v. Barnes*, 4 Heisk. (Tenn.) 570.]

<sup>3</sup> *Abell v. Harris*, 11 Gill & Johns. (Md.) 371.

<sup>4</sup> *Taylor ex dem. Atkyns v. Horde*, 1 Burr. 60.

<sup>5</sup> See the opinion of the court, by Wilde, J., in *Bates v. Norcross*, 14 Pick. (Mass.) 229. And the remarks of the Chancellor in *Varick v. Jackson*, 2 Wend. (N. Y.) 208.

liberal views," says our venerable commentator on American law, "which dictated the decision in *Atkyns v. Horde*, seemed to have finally prevailed in Westminster Hall, notwithstanding the strong opposition which that case met with from the profession. The courts will no longer endure the old and exploded theory of disseisin. They now require something more than mere feoffments and leases to work, in every case, the absolute and perilous consequences of a disseisin in fact."<sup>1</sup> Such is the view taken by the courts in Massachusetts.<sup>2</sup> It has been, in that State, expressly held, that a deed of wild land, executed and acknowledged by the grantor, who had no right to the land, and duly recorded in the registry of deeds, and a mere entry by the grantee without an open occupation manifested by fencing or otherwise, do not amount to a disseisin against the will of the true owner; and that the registry of such a deed is not constructive notice to the true owner that such conveyance has been made; such registry being constructive notice only to after purchasers under the same grantor.<sup>3</sup> In Maine, if a person enter under a deed duly registered from one having no legal title to the land, notorious occupancy and improvement of a part is necessary to constitute a disseisin of the whole tract of land; because it gives notice to the true owner to learn the extent of the claim by an inspection of the public registry.<sup>4</sup> An entry upon two contiguous town lots in Pennsylvania, under a deed of conveyance, was presumed to be in accordance therewith, so as to render the *actual possession* of part, by *fencing*, coextensive with the boundaries described in the deed.<sup>5</sup>

410. It is very clear, that, where there is a *mixed possession* under a color of title, or a possession at the same time of more persons than one, each claiming under a separate colorable title, the seisin of the estate is in him who has the better title; for, as all cannot be seised, the possession follows the title. This has been so expressly adjudged by the Supreme Court of the United States, in an action of ejectment, brought to recover possession of a tract of land in the State of Kentucky, claimed under senior and junior titles; wherein it was also held, that the disseisin by one

<sup>1</sup> Kent's Com. 475.

<sup>2</sup> Colburn v. Hollis, 8 Met. (Mass.) 125.

<sup>3</sup> Bates v. Norcross, 14 Pick. (Mass.) 224.

<sup>4</sup> Proprietors of Ken. Purchase v. Laboree, 2 Greenl. (Me.) 278. And see Robinson v. Sweet, 8 Ib. 316; Little v. Megquier, 2 Ib. 176; and Shaw v. McLellan, 10 Shep. (Me.) 417.

<sup>5</sup> Hawkins v. Robinson, 8 Watts (Penn.), 205.

under a junior title, of one under a senior title, is limited by the actual occupancy of the former.<sup>1</sup> The courts, in Maryland, held it to be a clear principle of law, that if two persons are in possession of the same land at the same time, the one by title, and the other by wrong, it is his possession who has the best right;<sup>2</sup> and that this principle "is founded in justice and general convenience, favors right, and resists wrong and oppression."<sup>3</sup> In a case in Pennsylvania, where two (an owner and an intruder) were in actual occupation and possession of a part of the same land, the court held, that in this kind of mixed, constructive possession, the legal seisin is according to the title; that title draws possession to the owner, that it remains until he is dispossessed, and then no further than the actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the title.<sup>4</sup> The doctrine, as laid down by Chief Justice Parsons, of Massachusetts, is: "Although there may be a concurrent *possession*, there cannot be a concurrent *seisin* of land; and one only being seised, the possession must be adjudged to be in him, because he has the best right."<sup>5</sup> Agreeably to this doctrine, it has been held, in that State, that the claiming under a deed of flats, near the Long Wharf, in Boston, and the occasional passing over the same, and mooring vessels on them, would not be considered, in law, as such an ouster and such an exclusive possession against the true proprietor, as to amount to a disseisin of him, while he not only claimed, but actually occupied, the flats originally granted him, as

<sup>1</sup> *Barr v. Gratz*, 4 Wheat. (U. S.) 218. Opinion by Story, J., who says: "Now it is clear, that the title of Craig, and, of course, of his grantee, Gratz, was older and better than Netherland's; and the possession of Barr, under that title, being the possession of Gratz, the legal seisin of the land, which was not sold to Barr, was, by construction of law, in Gratz; and the disseisin of Colburn, under a junior title, did not extend beyond the limits of his actual occupancy." [*White v. Burnley*, 20 How. (U. S.) 235; *Fancher v. De Montague*, 1 Head (Tenn.), 40. Title and seisin are always considered united until the contrary is shown. *Doe v. Butler*, 8 Wend. (N. Y.) 149.]

<sup>2</sup> *Gitting's Lessee v. Hall*, 2 H. & Johns. (Md.) 112; *Cheney v. Ringold*, Ib. 87.

<sup>3</sup> Per Chase, Ch. J., in *Hammond v. Ridgley*, 5 H. & Johns. (Md.) 245.

<sup>4</sup> *Hull v. Powell*, 4 Serg. & Rawle (Penn.), 465; *Mather v. Trinity Church*, 8 Id. 509.

<sup>5</sup> *Langdon v. Potter*, 8 Mass. 219. So in Maine; where one conveyed land, in that State, in fee, with general warranty, and a stranger at the same time was seised, in fact, of part of the same land by an older and better title, the entry of the grantee, under his deed, gives him seisin only of that part of which his grantor was seised; but, as to the stranger, the entry by the grantee is a mere trespass. *Cushman v. Blanchard*, 3 Greenl. (Me.) 266.



occasion required.<sup>1</sup> Where two persons are in possession, whether it be of a tract of land or of a house, it is his possession who has the right.<sup>2</sup>

411. It has been held, that a possession taken under a grant from a *foreign* government is not held under a sufficient color of title to render it adverse. The court, in *Jackson v. Ingraham*, in the State of New York,<sup>3</sup> stated expressly, that "they could not

<sup>1</sup> *Brimmer v. Proprietors of Long Wharf*, 5 Pick. (Mass.) 181. [And see *ante*, § 391, note at the end.] In every case of mixed possession, the legal seisin is according to the title. *Gilman v. Winslow*, 10 Mass. 151; *Commonwealth v. Studley*, Ib. 408; *Mathers v. Ministers of Trinity Church*, 8 Serg. & Rawle (Penn.), 509. By *Duncan, J.*: "There would appear to be no clearer principle of reason and justice than this, that, if the rightful owner is in the actual occupancy of a part of his tract by himself or tenant, he is in the constructive and legal possession, and seisin of the whole; unless he is disseised by actual occupation and dispossession. If this were not the law, the possession by wrong would be more favored than the rightful possessor. There are *two*, each in the actual possession and occupation of a part of a surveyed tract, the owner, and an intruder. Who, then, is in possession of the part not occupied by enclosure by either, the man who has no right but by disseisin of a part, or he who is in the actual occupancy of a part, and the rightful owner of the whole? In this kind of *mixed*, constructive possession, the legal seisin is according to the title. Title draws possession to the owner. It remains until he is dispossessed, and then no further than actual dispossession by a trespasser, who cannot acquire a constructive possession, which always remains with the title." *Hall v. Powell*, 4 Serg. & Rawle (Penn.), 465. See also *Burns v. Swift*, 2 Ib. 486; *Orbison v. Morrison*, 1 Hawkes (N. C.), 468; *Cushman v. Blanchard*, 8 Greenl. (Me.) 266; *Dow v. Stephens*, 1 Dev. & Bat. (N. C.) 5; *Davidson's Lessee v. Beatty*, 2 H. & McHen. (Md.) 621. A farm is divided into two separate parts, which parts are possessed as distinct farms for thirty years; on survey, it is ascertained, that the owner of one portion has in possession twenty-two acres more than the other; it was held, in an action of ejectment brought to equalize the possessions, that the rights of the parties were controlled by the original division, and the possessions under it, although the survey had been procured by the defendant. *Livingston v. Peru Iron Co.*, 9 Wend. (N. Y.) 511.

<sup>2</sup> *Davidson v. Beatty*, 3 H. & McHen. (Md.) 621. [A, the owner of a tract of land, sold the western half to B, by metes and bounds. The whole tract was subsequently sold under a void judgment for taxes, and C became the purchaser. He placed a tenant on the eastern half, who remained in possession seven years, claiming the whole tract by virtue of the tax sale. There was no visible open possession of the western half by C. It was held, that the statute did not bar the right of B, and that the constructive possession of B was not disturbed by C's occupation of the eastern half. *Stewart v. Harris*, 9 Humph. (Tenn.) 714. The occupation of pine land by annually making turpentine on it, is such an actual possession as will oust a constructive possession by one claiming merely under a superior paper title. *Bynum v. Carter*, 4 Ired. (N. C.) 310. Where a party is in actual possession, and has a right to possession under a legal title, which is not adverse, but claims the possession under another title which is adverse, the possession will not in law be deemed adverse. *Nichols v. Reynolds*, 1 Angell (R. I.), 80.

<sup>3</sup> *Jackson v. Ingraham*, 4 Johns. (N. Y.) 163.



take notice of any title to land not derived from our own government, and verified by a patent under the great seal of the State or Province of New York." The court, therefore, would not take notice of claims to lands within the State, under grants made by the French government, in Canada, prior to the treaty between Great Britain and France in 1763; those claims being, at most, equitable titles, and affording no evidence of a legal title that can be recognized by a court of law. And again, in *Jackson v. Waters*,<sup>1</sup> in which the defendant endeavored to set up, as a bar, an adverse possession, under a title derived from one M., the court recognized the principle, that a title not derived from our own government, could not be noticed; and that grants from the French government were to be treated as nullities, and therefore as affording no legal evidence of title which the court could recognize; and that possession taken under them cannot be deemed a possession taken in hostility to any private or individual right, but was rather a matter of controversy between the two governments. Hence, the possession of those through whom the defendant claimed could not be deemed adverse, if the original entry under M. was not to be so considered, as it clearly was not; it being taken under a foreign government, which must be rejected as a *legitimate source* of title. But one of the judges of the Court of Errors, in referring to the decision in this case of *Jackson v. Waters*, in the Supreme Court, was constrained to the opinion that it was not the true doctrine of that court,<sup>2</sup> and maintained that the policy and the express terms of the statute of limitations protected every possession, under pretence or claim of right, without the least regard to the *validity of the source* whence that claim is derived.<sup>3</sup>

412. A grant by any of the aboriginal natives of this country, being not from an acknowledged legitimate source, gives no color of title, and their possession does not affect the validity of a patent from the government. The policy or the abstract right of granting lands in their occupation as original lords of the soil has been deemed a political question, with which courts of judicature have nothing to do.<sup>4</sup> An occupant under an Indian grant, the Indians

<sup>1</sup> *Jackson v. Waters*, 12 Johns. (N. Y.) 365.

<sup>2</sup> Referring to the general doctrine of adverse possession, as laid down by the judges, in 9 Johns. (N. Y.) 180, and 10 Ib. 356.

<sup>3</sup> Viele, Senator, *La Frombois v. Jackson*, 8 Cow. (N. Y.) 589. [And see *Barney v. Sutton*, cited in note to § 894, *ante*.]

<sup>4</sup> *Jackson v. Hudson*, 3 Johns. (N. Y.) 884; *Thompson v. Gotham*, 9 Ohio, 170; *Cocke v. Dodson*, 1 Tenn. 169.

having afterwards resumed the title and granted it to the crown, before the Revolution, was a tenant at will of the king, and afterwards of the sovereign power established in this country; and no length of such occupancy will give a title by adverse possession.<sup>1</sup> The subject of the legal effect and operation of Indian possession, and of an Indian deed, received very full examination of the Supreme Court of the United States in *Johnson v. McIntosh*. Chief Justice Marshall, who delivered the opinion of the court, went into a very particular examination of the principles and policy which had governed all the European nations which had made discoveries and settlements in this country, touching the rights of the natives. The title of the government to the country was placed on the ground of discovery, which title was to be consummated by possession, and which gave to the government the exclusive right of acquiring the soil from the natives, and of regulating the relations that were to exist between such government and the natives.<sup>2</sup>

413. One of the essential requisites to constitute such an adverse possession as will be of efficacy under the statute is *continuity*; and whether a possession is to be regarded as continuous or not, when taken successively by different persons, depends much upon the circumstances. If one merely enters and commits a trespass, and then *goes off*, and another comes after him and commits a trespass, it is not to be denied that there is no privity between these persons, nor can the possession be said to be continued from one to another.<sup>3</sup> It is, indeed, a principle well established, that, where several persons enter on land in succession, the several possessions cannot be tacked, so as to make a continuity of possession, unless there is a privity of estate, or the several titles are connected.<sup>4</sup> Whenever one quits the possession, the seisin of the true owner is restored, and an entry afterwards by another, wrongfully, constitutes a new disseisin.<sup>5</sup> The continuity of possession having

<sup>1</sup> *Jackson v. Porter*, Paine (Cir. Co.), 457.

<sup>2</sup> *Johnson v. McIntosh*, 8 Wheat. (U. S.) 571.

<sup>3</sup> Per Tilghman, Ch. J., in giving the opinion of the court, in *Overfield v. Christie*, 7 Serg. & Rawle (Penn.), 177.

<sup>4</sup> Per Wilde, J., in giving the opinion of the court, in *Melvin v. Proprietors of Locks, &c.*, 5 Met. (Mass.) 15. [*Moore v. Collishaw*, 10 Barr (Penn.), 224; *Christy v. Alford*, 17 How. (U. S.) 601; *Doswell v. De La Lamza*, 20 How. (U. S.) 29; *Doe v. Brown*, 4 Ind. 148; *Choquette v. Barada*, 28 Mo. (2 Jones) 881; *Merriam v. Hayes*, 19 Ga. 294; *Shaw v. Nicholas*, 30 Mo. (9 Jones) 99.]

<sup>5</sup> *Potts v. Gilbert*, 8 Wash. (Cir. Co.) 475. The same principle is laid down in

been broken, before the expiration of the period of time limited by the statute of limitations, an entry within the time destroys the efficacy of all prior possession, so that, to gain a title under the statute, a new adverse possession for the time limited must be had.<sup>1</sup>

414. There must be such a privity, that the possessions may each be referred to one entry, as in the case of landlord and tenant, or in the case of the heirs of a disseisor, as father and son.<sup>2</sup> That a

*Ward v. Bartholomew*, 6 Pick. (Mass.) 415; *Allen v. Holton*, 20 Ib. 465; *Jackson v. Leonard*, 9 Cow. (N. Y.) 658; *Doe v. Campbell*, 10 Johns. (N. Y.) 475. [There may be occasional interruptions in the actual occupancy, and even possession by others not shown to be trespassers, and claiming adversely, without breaking the continuity of possession. *Rayner v. Lee*, 20 Mich. 384.]

<sup>1</sup> *Pederick v. Searle*, 2 Serg. & Rawle (Penn.), 240. A single act of taking possession, and then leaving the land, will not do. The possession that is capable of ripening into title must be notorious and *continued*, without entry, claim, or action on the other side. *Andrews v. Mulford*, 1 Hay. (N. C.) 320. And see *Park v. Cochran*, Ib. 180; *Hood v. Hood*, 2 Grant (Penn.), 229. A mere survey, not made with the purpose of resuming possession, is no entry which breaks the continuity. *Hollingshead v. Naurvan*, 45 Penn. St. 140. [That the possession to constitute a bar in ejectment must be continued, see *Wickliffe v. Ensor*, 9 B. Mon. (Ky.) 253; *Holdfast v. Shepard*, 6 Ired. (N. C.) 361; *Taylor v. Burnside*, 1 Gratt. (Va.) 165; *Doe v. Eslava*, 11 Ala. 1028; *Cornelius v. Giberson*, 1 Dutch. (N. J.) 1. And the interruptions of mere trespassers, if not promptly and effectually litigated, may break the continuity and defeat a prescriptive claim. *Ibid.* A purchaser, by parol contract, from one in the adverse possession of land, may tack his possession to that of his vendor. *Cunningham v. Patton*, 6 Barr (Penn.), 355. See also *Valentine v. Cooley*, 1 Meigs (Tenn.), 613. And an interval of many years does not, as matter of law, imply an abandonment. It is a question of fact for the jury. 2 Wms. (Vt.) 94. But held otherwise in *Ward v. Herrin*, 4 Jones's Law (N. C.), 23. And see *Bryne v. Lowry*, 19 Ga. 27. A sale of land on execution passes to the purchaser an adverse possession enjoyed by the defendant on adjoining land as appurtenant to the land sold, and the purchaser may tack his possession to the possession of the defendant, in order to give him a title under the statute of limitations. *Scheetz v. Fitzwater*, 5 Barr (Penn.), 126. The title of an assignee under the United States Bankrupt Act may be tacked to that of the purchaser from the assignee. *Cleveland Ins. Co. v. Head*, 24 How. (U. S.) 284. If the deed of a grantor by mistake omits a portion of the property adversely held, an agreement to sell that portion with the rest is admissible as showing the relation of the possession taken to that relinquished. *Smith v. Chapin*, 31 Conn. 530. And the administrator's possession may be tacked to that of his intestate. *Moffitt v. McDonald*, 11 Humph. (Tenn.) 457. Otherwise, in Maine, where it is held that the title must pass by contract, in order that possessions may be tacked together. *Bullen v. Arnold*, 31 Me. (1 Red.) 583.]

<sup>2</sup> *King v. Smith*, 1 Rice (S. C.), 10. [And the possession of a tenant holding under the ancestor inures to the heir. *Williams v. M'Aliley*, Cheeves (S. C.), 200. A recovery in ejectment by one having the better title, and the attorning of the defendant's tenant to the plaintiff, under the pressure of a writ of *hab. fac. pos.* destroys the continuity. *Groft v. Weakland*, 34 Penn. St. 304. But a wife has no such privity of estate with her husband in land in an adverse possession of which he died, that her continued adverse possession after her husband's decease can be tacked to his, to give

purchaser without notice has a right to join his adverse possession to the ostensible adverse possession of his vendor, so as to give him, the purchaser, the benefit of the statute of limitations, has been held by the Supreme Court of the United States.<sup>1</sup> It is laid down by Chief Justice Tilghman, in giving the opinion of the Supreme Court of Pennsylvania, that one who enters on land as a trespasser, and continues to reside upon it, acquires something which he may transfer by *deed*, as well as by descent; and, if the possession of such person, and others claiming under him, *added* together, amounts to the time limited by the act of limitations, and was adverse to him who had the legal title, the act is a bar to a recovery.<sup>2</sup> In Connecticut, it has been held, that an adverse possession for the time limited by the statute, after the cause of action accrued, and before suit brought, bars the plaintiff of his right of entry thereafter, whether the adverse possession be by the same person or persons for the whole term, or by different persons for different periods, making the whole time in all; provided the adverse possession, or the disseisin, has been continued and uninterrupted.<sup>3</sup> So it has been expressly held, in Pennsylvania, that, where the defendant sets up a possession for the time limited by the statute, and gives evidence of a possession by A, he may give evidence to show that A held adversely to the plaintiff, though even he has not previously proved the connection of A's possession with his own.<sup>4</sup> In a case in Kentucky, there was a continued adverse possession for the full time limited by the statute; but it appeared that the person who first took possession of the land in

title by disseisin. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241. Possession by the husband, however, of land claimed by him to belong to his wife, may be added to her possession, as his widow, immediately after and following his decease, to sustain the title of the widow. *Holton v. Whitney*, 80 Vt. (1 Shaw) 405. So may that of a son-in-law to that of his father-in-law. *St. Louis v. Gorman*, 29 Mo. (8 Jones) 198. Though a husband may avail himself of his wife's adverse possession in defence to a writ of entry brought against him by one to whom, within twenty years, he has released the property. *Steel v. Johnson*, 4 Allen (Mass.), 425. And see also *Smith v. Gurza*, 15 Texas, 150.

<sup>1</sup> *Alexander v. Pendleton*, 8 Cranch (U. S.), 462. [And this is so, even though the deeds are fraudulent. *Clark v. Chase*, 5 Sneed (Tenn.), 636.]

<sup>2</sup> *Overfield v. Christie*, 7 Serg. & Rawle (Penn.), 177. [The claim may be under a will, deed, or verbal agreement. *McNeely v. Langan*, 22 Ohio St. 82.]

<sup>3</sup> *Fanning v. Wilcox*, 8 Day (Conn.), 269. [The successive tenants must claim through their predecessors. *Johnson v. Nash*, 15 Texas, 419. If they hold independently, the continuity is broken. *Menkens v. Blumenthal*, 27 Mo. (6 Jones) 198.]

<sup>4</sup> *M'Coy v. Dickenson College*, 5 Serg. & Rawle (Penn.), 254.

controversy, before he himself had been in possession for the whole of that time, surrendered it to the defendants, or those under whom they held, in pursuance of a decree entered upon an award giving them the land in virtue of an adverse claim prior to the commencement of the suit. It was held by the court, that this circumstance would not prevent the statute from operating as a bar to the plaintiff's recovery, and that it could not, "in the reason and nature of the thing, produce any difference, whether the possession be held uniformly under one title, or at different times under different titles, provided, that the claim of title be always adverse to that of the plaintiff; nor whether the possession be held by the same or a succession of individuals, provided that the possession be a continued and uninterrupted one."<sup>1</sup> A, claiming title to land by descent, made, in the first place, a parol gift of the same to B, under which B entered; and, afterwards, he conveyed by deed the same land to B; and it was held, that, if the deed related back to the entry of B, there was an adverse possession commencing in B; and if it did not, still as B, by virtue of the parol gift, became the tenant at will of A, and his possession was to be deemed the possession of A, there was an adverse possession commencing in A.<sup>2</sup>

<sup>1</sup> *Shannon v. Kinney*, 1 Marsh. (Ky.) 4. And see also *Hord v. Walton*, 2 Ib. 620. (*Pleake v. Chambers*, 7 B. Mon. (Ky.) 565.)

<sup>2</sup> *Jackson v. Ellis*, 18 Johns. (N. Y.) 118. In South Carolina, a defendant, who has been in possession for a less time than the statutory period, cannot unite his possession with that of a previous tenant, from whom he purchased, in order to make out the time required, by the statute, to bar the plaintiff's recovery; for, until that period is run out, they are both to be regarded, as respects the true owner, as mere trespassers. A conveyance from the first to the second tenant transfers nothing. If both possessions could be referred to one entry, as in the case of landlord and tenant, or in the case of a disseisor to his heirs, and a continuance of possession by them, then the operation of the statute would commence from the entry of the landlord or the ancestor. *King v. Smith*, 1 Rice (S. C.), 10. In the Constitutional Court of South Carolina, it was held, that any transmission or mutation of land, during the time required by the limitation act to bar the true owner's right of possession, breaks the continuity of the possession, though the succeeding tenant should derive his possession from the tenant who immediately preceded him, and should claim through him by the same or a concurrent title. But Brevard, J., dissented; and he could see no ground, in reason, justice, or policy, for a distinction between a succession of different occupants, holding by the same title, or under a fair and regular transfer of the same right, and a continued occupation by one person only. *Mazyck v. Wight*, 8 Brev. (S. C.) 151. In Tennessee, if the defendant has not any title, but is in possession by consent of another person, his possession may be coupled with the other. *McIver v. Reagan*, Cooke's (Tenn.) 866; *Napier v. Simpson*, 1 Tenn. 448. In Ohio, prior pos-

415. Although it appears, by a former chapter, perfectly unquestionable, that it is a well-established general rule, that the rights of persons in remainder or reversion are not affected by neglect in the tenant for life or for years, during the continuance of the particular estate, in resisting the acts of wrong-doers, yet in certain cases, presumptions may exist to the contrary. In the case of a *boundary line* in dispute, and the dispute is adjusted by the agreement of tenant for life, such agreement, if proved, is presumptive evidence to bind the remainder-man. For, although the remainder-man may assert that his right has been invaded, and, although the fact may be so, yet the submission of the tenant for life (if without fraud) raises a strong presumption against those who succeed him.<sup>1</sup> There is, says Lord Redesdale, in the case just referred to, a vast number of cases, in which the act of tenant for life binds the remainder-man as evidence; and he then refers to the enjoyment of easements. In the instances of rights of way and of common, presumptions are sometimes made against the owners of land during the possession and acquiescence of their tenants, because the tenant suffers a direct and palpable injury to his own possession, and is presumed to be on the alert in guarding the rights both of himself and his landlord. And, if it be proved that the landlord had actual knowledge of the injury, and submits, he will clearly be bound.<sup>2</sup> In a case in England, where a right of common was in question, it was ruled, that, although it had been exercised adversely for more than twenty years, if it does not clearly appear to have been generally known to all interested in opposing the right claimed, it is a question for the jury whether the enjoyment is to be referred to a right or an encroachment.<sup>3</sup> There is another case in England, which also shows that, in all such cases, the question is to be determined by the particular circumstances of the case, which are proper for the consideration of the jury. Dallas, Ch. J., in this case, says: "When lapse of time is said to afford such a presumption, the inference is also drawn from accompanying facts; and here, where there is no direct evidence, whether or not the owner of the land had any knowledge

session by the ancestor, claiming title, is sufficient for the heir to recover upon in ejectment, against a subsequent possession for less time than that limited by the statute, without title. *Ludlow's Heirs v. McBride*, 3 Ham. (Ohio) 240.

<sup>1</sup> *Saunders v. Annesley*, 2 Sch. & Lefr. 101.

<sup>2</sup> *Daniel v. North*, 11 East, 371.

<sup>3</sup> *Devereux v. Duke of Norfolk*, 1 Price, 247.



of what passed, the inference to be drawn must, in a peculiar degree, depend on the nature of the accompanying facts; and the presumption in favor of a grant will be more or less probable that those facts could not have existed without the consent of the owner of the land. The circumstances proved in the present case were sufficient to leave to a jury, as circumstances from which the knowledge of the owner, and his acquiescence on the supposition of a preceding grant, might fairly be presumed."<sup>1</sup> In an action for the disturbance of a water privilege, and in a fact of any easement, the enjoyment may be shown not to have been adverse, by evidence that the party has not been in possession of the premises to which the privilege or easement is attached; and that he has had no knowledge of it. With such evidence, if a tenant for term of years, or for life, permits another to enjoy an easement on the estate for twenty years or upwards, and the particular estate then determines, the enjoyment will not affect him who has the inheritance in remainder or reversion. Therefore, he who has the inheritance may dispute the right to the easement, and the length of possession will be no obstacle to his claim. The principle undoubtedly is, that, as the tenant is incompetent to bind the landlord by his own positive act, so he cannot bind by his inaction or forbearance; unless knowledge and acquiescence on the part of the landlord or remainder-man appear to the satisfaction of the jury; or the case be such that the tenant or remainder-man himself would be particularly interested in resisting encroachment.<sup>2</sup> But the mere enjoyment of an easement, being the exercise of a right, cannot amount to a disseisin of the owner of the land to which the easement is annexed.<sup>3</sup>

416. As to the general law of adverse possession in the State of New York, it will be found condensed and stated with admirable precision by the Revised Statutes of that State, and very much in conformity to what had been previously settled by its own local judicial tribunals;<sup>4</sup> and like enactments form a part of the statute law of Wisconsin,<sup>5</sup> which is evidence that they are alike adapted to old and densely inhabited and to new and thinly inhabited Ter-

<sup>1</sup> *Gray v. Bond*, 2 Br. & Bing. 667.

<sup>2</sup> *Bradbury v. Grinsell*, cited in *Wms. Saund.* 175, n. (d); *Barker v. Richardson*, 4 B. & Ald. 578.

<sup>3</sup> *Stetson v. Veasie*, 2 Fairf. (Me.) 408.

<sup>4</sup> See Appendix, p. lviii. *et seq.*

<sup>5</sup> See Appendix, p. cxxxiii. *et seq.*



ritories. In ejectment, brought in the State of New York, as a substitute for a writ of right, to enforce a claim which accrued before the Revised Statutes went into effect, an adverse possession of twenty-five years must be shown, in order to bar the action; but otherwise, if the case be one in which a writ of right could not have been maintained.<sup>1</sup>

417. We would next invite attention to the late English statute, which has been hitherto several times the subject of reference and partial comment, — the statute of 3 & 4 Will. IV. c. 27. Great practical difficulty, say the English real-property commissioners, has arisen, in determining what is adverse possession, and when it shall be considered to have begun. This must generally be left as a question of fact for the jury; but there are some rules of law, *præsumptiones juris et de jure*, which absolutely prevent the possession from being considered adverse, and the expediency of which is very questionable, as they do not seem necessary for preserving rightful claims, and they greatly impair the healing tendency of the statutes of limitation. One of these rules is, that a possession which began rightfully cannot be considered as having become wrongful, that is, adverse, as against the rightful owner, by being merely continued after the right of the party in possession has determined. To the commissioners, it appeared that it should be open to a jury to find, that adverse possession began from the determination of the rightful estate of the party.<sup>2</sup> Where a feme sole, seised in fee, married, and she and her husband ceased to be in possession or enjoyment of the land, and went to reside at a distance from it; and they both died at times which were not shown to be within forty years from their ceasing to occupy; and the wife's heir at law brought ejectment against the person in possession within twenty years of the husband's death, and within five years of the passing of the statute 3 and 4 Will. IV., but more than forty years after the husband and wife had ceased to occupy, it was held that the heir at law was barred by the 17th section of that statute, though it did not appear when or how the defendant came into possession. By Lord Denman: "The fact being clear that within the terms of 3 and 4 Will. IV. c. 27, § 3, the plaintiff's mother was dispossessed, or discontinued the possession, or receipt of the rents, above forty years before the

<sup>1</sup> *Cole v. Irvin*, 6 Hill (N. Y.), 684; [*Willson v. Betts*, 4 Denio (N. Y.), 201.]

<sup>2</sup> Report of Real Property Commissioners, p. 47.

action brought, the action is clearly barred by section 17 of the same statute. Some argument was raised on the question whether the possession was adverse or not; but the terms of that clause are unequivocal, and one of its objects was to avoid the necessity of inquiring into facts of so ancient a date.”<sup>1</sup>

418. The mere fact of possession by one claiming no title to the premises, it has appeared, is no disseisin of the rightful owner; and the latter may therefore convey or devise, notwithstanding statutes for the prevention and punishment of champerty, &c.<sup>2</sup> But that the deed of a disseisee, during the continuance of the disseisin, is inoperative to convey a title, has, in a very modern case, been declared a familiar principle of the common law, which cannot be controverted.<sup>3</sup> It is inoperative, however, only as against the disseisor, or person holding adversely, and others afterwards coming in under him; and, in respect to all the rest of the world, it is operative, and passes, therefore, the grantor's title. Accordingly, if, after such deed, the person who held adversely voluntarily abandon the possession, the grantee may enter and enjoy the land; or, if a stranger enter, the grantee may bring ejectment, and oust him. But if the adverse holder continue in possession after the deed, the grantor is the only person who can sue for the land; and a recovery by him will enure to the benefit of the grantee. It may indeed be laid down as a maxim in the law, that a title which once existed must continue to reside somewhere; it cannot be annihilated.<sup>4</sup> Such adverse possession will not, however, affect the deed, if it appear that both the grantor and the adverse claimant were under an equitable title to convey. The statute of maintenance was intended for the benefit of adverse claimants; and they can renounce the benefit of it. A, being the owner of a farm, executed a deed to B, intending thereby to convey the

<sup>1</sup> *Corbyn dem. Branston*, 8 Adol. & Ell. 68; and 8 Eng. Com. Law, 30; and 4 Nev. & Man. 664. And, for further decisions on this subject, under the important statute of 8 and 4 Will. IV., and the construction given it, see Appendix, from p. xxiii. to p. xxxi.

<sup>2</sup> *Jackson v. Todd*, 2 Caines (N. Y.), 153.

<sup>3</sup> *Parker v. Proprietors of Locks and Canals*, 3 Met. (Mass.) 98. And see *Bradstreet v. Huntingdon*, 5 Peters (U. S.), 402.

<sup>4</sup> *Livingston v. Proseus*, 2 Hill (N. Y.), 526; *Jackson v. Brinckerhoff*, 3 Johns. (N. Y.) Cas. 101; *Jackson v. Vandenburg*, 1 Johns. (N. Y.) 159; *Williams v. Jackson*, 5 Ib. 489; *Jackson v. Leggett*, 7 Wend. (N. Y.) 377. [In Illinois, a deed of a grantor of land held adversely against him will convey all his rights, but will not operate to stop the running of the statute. *Shortall v. Hinckley*, 31 Ill. 219.]

whole; but, by means of a mistake in the description, the deed only conveyed about one-third of the farm. B took possession, and executed a mortgage, intending that it should cover the whole farm, but which, in fact, contained a description copied from the deed. The mortgage was assigned to D, and foreclosed, he becoming the purchaser. Some time afterwards D discovered the mistake in the deed and mortgage, and requested A and B to correct it, threatening to file a bill against them if they refused. B said he would abide by whatever A thought proper to do in the matter; whereupon the latter executed to D a quitclaim deed of the whole farm, B being still in possession. It was held that D acquired a title to the whole farm.<sup>1</sup>

<sup>1</sup> *Cameron v. Irwin*, 5 Hill (N. Y.), 272. The purchaser of an equity of redemption, sold by the sheriff on execution, obtains by the sale a seisin of the land, unless the mortgagor is disseised at the time of the sale, in which case he obtains only a right of entry; and, in order to maintain a writ of entry, counting upon his own seisin, he must actually enter. *Poignard v. Smith*, 6 Pick. (Mass.) 172. The old cases with regard to maintenance and champerty go further than would now be sustained in courts of equity. *Baker v. Whiting*, 8 Sumn. (Cir. Co.) 476.

## CHAPTER XXXII.

## JOINT TENANCY.

419. AN estate in *joint-tenancy* is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will.<sup>1</sup> An estate given to a number of persons, without any restriction or explanation, will, at common law, be construed a joint-tenancy; for every part of the grant can take effect only by considering the estate equal in all.<sup>2</sup> Joint-tenants are said, in technical language, to be seised, *per my et per tout*; that is, each of them has the entire possession, as well of every part as of the whole; or, no one can be exclusively seised of one acre, and his companion of another; each having an undivided moiety of the whole, and not the whole of an undivided moiety. The seisin and possession of one joint-tenant, then, being the seisin and possession of the other or others, one can never be dis-seised by another, without, in the language of the books, an *actual ouster*.<sup>3</sup> And hence, the mere fact of uninterrupted possession of one joint-tenant, or an uninterrupted possession which implies no expulsion of the other, is not adverse.<sup>4</sup>

420. An *estate in common* is one which is held by two or more persons by unity of possession, who may acquire their estate by purchase, and hold by several and distinct titles, as well as by title derived at the same time, by the same deed or will. It differs from a joint-tenancy, in which there is both unity of title and

<sup>1</sup> 2 Black. Com. 179.

<sup>2</sup> The distinguishing incident of this estate is the right of survivorship, or *jus accrescendi*; and, at common law, the entire tenancy or estate, upon the death of any one of the joint-tenants, went to the survivors, and so on to the last survivor, who took an estate of inheritance. This right of survivorship has been abolished in most of the States in this country. Griffith, Ann. Law Reg.; 4 Kent, Com. 859; 1 Swift's Dig. 102; 1 Bouv. Law Dict. 528.

<sup>3</sup> 1 Litt. 288; 2 Cruise, Dig. 497; Reading v. Rawsterne, 2 Salk. 422; Martin v. Smith, 5 Binn. (Penn.) 22.

<sup>4</sup> [Brooks v. Towle, 14 N. 248. But a grantee, by conveyance from one of two joint owners of land, after possession taken, holds adversely to the other joint owner. Larman v. Huey, 13 B. Mon. (Ky.) 486.]

unity of time. Like a joint-tenant, a tenant in common can never be disseised but by an actual ouster.<sup>1</sup>

421. An *estate in coparcenary* is an estate of inheritance in lands which descend from the ancestor to two or more persons, who are called *coparceners* or *parceners*. In England, the term is applied to cases only where land descends to females, for the want of a male heir. In this country, estates generally descend to all the children equally; and whatever there may be of technical distinction between coparcenary and estates in common may be considered as essentially extinguished in the United States.<sup>2</sup> The same general doctrine, therefore, in respect to adverse possession, as between coparceners, applies, that applies as between tenants in common, and as between joint-tenants; and one heir, notwithstanding his entry as heir, may afterwards, by disseisin of his coheirs, acquire an exclusive possession, upon which the statute will run against his coheirs.<sup>3</sup>

<sup>1</sup> See authorities last above cited; and *Hoffsetter v. Boonville*, 8 Mo. 276; *Caruthers v. Dunning*, 8 Serg. & Rawle (Penn.), 381; *Doolittle v. Blakesley*, 4 Day (Conn.), 478; *Burnitz's Lessee v. Casey*, Cranch (U. S.), 457. Devise of a moiety of a tract of land to be taken off the side nearest the testator's brother, and the other moiety to another, the devisees are not tenants in common. *Frederick v. Gray*, 10 Serg. & Rawle (Penn.), 182. If a person purchases land under an agreement that another shall be equally concerned, he will be considered, in equity, as holding for himself and the other as tenants in common. *Stewart v. Brown*, 2 Serg. & Rawle (Penn.), 461.

<sup>2</sup> 4 Kent, Com. 362; 1 Bouv. Law Dict. 522.

<sup>3</sup> *Ricard v. Williams*, 7 Wheat. (U. S.) 59; *Iler v. Routh's Heirs*, 3 How. (Miss.) 276. [*Means et al. v. Welles et al.*, 12 Met. (Mass.) 357; *Caperton v. Gregory*, 11 Gratt. (Va.) 505; *Miller's Appeal*, 8 Grant (Penn.), 247.] In New York, under the former practice in ejectment, judgment passed against the casual ejector (John Stiles), unless the tenant came in and entered into the consent rule, by which he was obliged to confess lease, entry, and ouster. If he claimed only an undivided interest in the premises, as coparcener, joint-tenant, or tenant in common, he was permitted, on showing that fact to the court, and that there had been no ouster, to enter into a special consent rule, admitting the lessor's title as to the undivided part, and was excused from confessing ouster to the extent of such conceded interest, leaving that question to be litigated on the trial. The Revised Statutes have abolished the consent rule, and it is now provided that it shall not be necessary, on the trial, for the defendant to confess, nor for the plaintiff to prove lease, entry, and ouster, except where the action is brought by one or more tenants in common, or joint-tenants, against their cotenants; in which case the plaintiff, in addition to other necessary proof, is required to show an actual ouster, or some other act amounting to a total denial of his right as such cotenant. Both from the former practice in ejectment, and from the language of the Revised Statutes, before the plaintiff can now be called upon to prove an ouster, the defendant must make out, on the trial, that he is a cotenant with him of the premises; and it is only when that relation is shown to

422. Lord Hobart reports it to have been laid down by the Court of Common Pleas, in 12 James, that the entry of one tenant in common might be in three ways: either in the name of herself or her fellow; or, generally, which shall always be taken according to right, as being under construction of law, and therefore lawful; or, lastly, entry claiming all expressly, which cannot dispossess her fellow, for her possession is over all lawful, as well before as after such claim, so that there is no possession altered by such claim. Then a sole claim without more can never change the possession; and, without a change of possession, it remains as before.<sup>1</sup> This authority shows that a tenant in common, like a joint tenant, can never be disseised by his cotenant, but by an actual ouster.<sup>2</sup>

423. The possession of one coparcener, like the possession of one tenant in common, is, as before mentioned, also the possession

exist that proof of ouster becomes necessary. Nor does the fact, that the plaintiff is seeking to recover an undivided interest only, devolve upon him the necessity of this proof; for it by no means follows that the defendant owns the other portion, or any part of it. The defendant being in the possession and occupation of the whole, the presumption, in the absence of any other proof to the contrary, is, that he holds in hostility to the plaintiff, — that he claims title to, and possession of, every part and parcel of the premises. The burden, therefore, lies upon him to make out the fact of a tenancy in common or joint-tenancy. This being done, the presumption of law arises that he holds in subordination to the right of his cotenant, and that his possession is the possession of both. And hence, in such case, the propriety and necessity of some evidence that he has denied the plaintiff's right, before he shall be subjected to the expenses of a suit. 2 N. Y. Rev. Stat. 806; and opinion of the court, by Nelson, Ch. J., in *Sharp v. Ingraham*, 4 Hill (N. Y.), 116. See also *Siglar v. Van Riper*, 10 Wend. (N. Y.) 414; *Butler v. Phelps*, 17 Ib. 647; *Gillett v. Stanley*, 1 Hill (N. Y.), 121. In England, an action of ejectment, founded on the joint demise by tenants in common, cannot be sustained. Adams on Eject. 186. This rule has been disregarded here, and actions of ejectment founded on the joint demise by tenants in common, have been sustained. The principle on which these cases proceed is, that the possession of tenants in common is joint, and that they may join in disposing of that interest. The demise alleged in the old action of ejectment was of a possessory interest, and no more; and such right only was recovered. But, although that doctrine may be sound as to the mere right of possession of tenants in common, it has no application to their right of property. They have not, as joint-tenants and coparceners have, a joint right of property. Their freeholds are several, and therefore they could not, at common law, join in real actions. *Cole v. Irvin*, 6 Hill (N. Y.), 684. And see also Roscoe on Real Actions, 7; *Jackson v. Bradt*, 2 Caines (N. Y.), 169; *Malcolm v. Rogers*, 5 Cow. (N. Y.) 188; *Doe v. Butler*, 8 Wend. (N. Y.) 149.

<sup>1</sup> *Snales v. Dale*, Hob. 120.

<sup>2</sup> *Reading v. Rawsterne*, 2 Salk. 422. One tenant in common received all the rents for twenty-six years. In an ejectment brought by the other tenant in common, for the recovery of his moiety, the question was whether this possession amounted to an expulsion of the companion. *Fairclaim v. Shackelton*, 5 Burr. 2604.

of his companion. In a writ of error, from the Court of King's Bench in Ireland to that of England,<sup>1</sup> it was argued for the defendant that sixty-two years' sole possession by one coparcener, and a fine, were a bar to the action by the common law; that the true state of the law was this; 1. If both enter, there must be an actual ouster to make a disseisin; 2. If one enters generally, and takes the profits, this is no disseisin; 3. If one enters specially, as in the present case, claiming right to the whole, and taking the whole profits, this is a disseisin; but, after his death, the other may enter, unless barred by the statute of limitations; 4. If, after a special entry, one by feoffment or fine destroys the coparcenary, and takes back an estate in fee, and dies, the entry of the other is barred. The court said the acts of ownership, fine, &c., made an actual ouster; so that the statute of limitations barred the plaintiff.

424. Upon a rule to show cause why a new trial should not be granted,<sup>2</sup> Lord Mansfield reported that, from the year 1734, one tenant in common had been in the sole possession of the lands, without any claim or demand, by any person or persons claiming under the other tenant in common; that no actual ouster was proved; but, upon the circumstances, he had left it with the jury to say, whether there was not sufficient evidence before them to presume an actual ouster; and, supposing there was an actual ouster, in that case the lessors of the plaintiff were barred. The jury found there was sufficient evidence to presume an actual ouster. After the case had been argued, Lord Mansfield said: "It is very true that I told the jury they were warranted by the length of time in this case to presume an adverse possession and ouster, by one of the tenants in common, of his companion; and I am still of the same opinion. Some ambiguity seems to have arisen from the term *actual ouster*; as if it meant some act accompanied with real force, and as if turning out by the shoulders were necessary. But that is not so. A man may come in by rightful possession, and yet hold over adversely without a title. If he does, such holding over, under circumstances, will be equivalent to an actual ouster."

425. The possession of one tenant in common *eo nomine*, as ten-

<sup>1</sup> Davenport v. Tyrrell, 1 Black. 675. [Mere acts of ownership by one's heirs do not constitute adverse possession of his coheirs. There must be a claim of exclusive right. Gilkey v. Peeler, 22 Texas, 668.]

<sup>2</sup> Doe v. Prosser, Cowp. 217.



ant in common, it was asserted by Lord Mansfield, in the above case, can never bar his companion, because such possession is not adverse to the right of his companion, but in support of their common title; and, by paying him his share, he acknowledges him to be cotenant. Nor, indeed, is a refusal to pay of itself sufficient, without denying his title. But if, upon demand of the cotenant of his moiety, the other denies to pay, and denies the title, and continues in possession, such possession is adverse, and ouster enough.

426. The above construction of Lord Mansfield, as to what is equivalent to an ouster of one tenant in common by his cotenant, or, in other words, what is an adverse possession of a cotenant, is supported by the opinion of Lord Kenyon.<sup>1</sup> *Prima facie*, he says, the possession of one tenant in common was that of the other; and every case and *dictum* in the books was to that effect. But it might be shown that one of them had been in possession, and had received the rents and profits to his own use, without account to the other; or that the other had acquiesced in this for such a length of time as might induce a jury, under all the circumstances, to presume an actual ouster of his companion; and there the line of presumption ended.<sup>2</sup>

427. Where A was seised in fee of an undivided moiety of an estate, devised the same (by will made some years before her death) to her nephew and two nieces, as tenants in common, one of the nieces died in the lifetime of A, and left an infant daughter. A, by another will, intended to have devised the moiety to the nephew and surviving niece, and the infant daughter of the deceased niece; but this will was never executed. After A's death, the nephew and surviving niece covenanted to carry the unexecuted will into execution, and to convey one-third of the moiety to a trustee upon trust to convey the same to the infant, if she attained the age of twenty-one; or to her issue, if she died under twenty-one and left issue; or, otherwise, to the nephew and niece in equal moieties. No conveyance was executed in pursuance of the deed. The rents of the third were received by the trustee, for the use of the infant during her lifetime. An ejectment having been brought by the devisee of the nephew more than twenty years after his

<sup>1</sup> *Peaceable v. Read*, 1 East, 568.

<sup>2</sup> See also *Taylor ex dem. Atkins v. Horde*, 1 Burr. 111; and *Doe v. Hellings*, 11 East, 49.

death, but less than twenty years after the death of the infant, it was held, that there was no adverse possession until the death of the infant.<sup>1</sup>

428. But, where lands were devised to a number of persons as tenants in common, and it was verbally agreed between them that one of them should give up his share, for a certain compensation, to the other devisees, who thereupon entered upon his share, and excluded him from the possession, it was held to be a disseisin of such devisee.<sup>2</sup>

429. The doctrine of adverse possession, as between cotenants, has been fully discussed by Mr. Justice Story, in *Prescott v. Nevers*.<sup>3</sup> In that case, the defendant had a deed of the whole estate, but his title was only valid as to an undivided quarter part, in common with the others. But he made an actual entry into the whole, and claiming the whole in fee. His acts of ownership, it was held, "were such as amounted to a disseisin of the cotenants; for he entered as sole owner, and his possession was openly and notoriously adverse to them." It was further said by the learned judge, that "there can be no legal doubt that one tenant in common may disseise another. The only difference between that and other cases is, that acts which, if done by a stranger, would *per se* be a disseisin, are, in the case of tenancies in common, susceptible of explanation, consistently with the real title. Acts of ownership are not, in tenancies in common, necessarily acts of disseisin. It depends upon the intent with which they are done, and their notoriety." This was considered a sound distinction by the Supreme Court of Massachusetts in a similar case, in which the decision was accordingly.<sup>4</sup> The English authorities cited by Chancellor Jones, in *Clapp v. Bromaghan*,<sup>5</sup> fully support the distinction. So in *Jackson v. Tibbetts*, in New York,<sup>6</sup> possession by one tenant in common will not *per se* constitute an adverse possession against his cotenants; but where, by some notorious

<sup>1</sup> *Doe v. Hulse*, 3 Barn. & Cress. 757.

<sup>2</sup> *Leonard v. Leonard*, 10 Mass. 231. And see *Boyd v. Graves*, 4 Wheat. (U. S.) 513.

<sup>3</sup> *Prescott v. Nevers*, 4 Mason (Cir. Co.), 884.

<sup>4</sup> *Parker v. Proprietors of Locks, &c.*, 3 Met. (Mass.) 101. [*Sydnor v. Palmer*, 29 Wis. 226.]

<sup>5</sup> *Clapp v. Bromaghan*, 9 Cow. (N. Y.) 530.

<sup>6</sup> *Jackson v. Tibbetts*, 9 Cow. (N. Y.) 24. And see also *Jackson v. Moore*, 6 Ib. 706, and *Catlin v. Kidder*, 7 Vt. 12.

act, he claims an exclusive right, though it be under a title which is void, the statute will run from the time of such claim. So has been the same distinction laid down by the Supreme Court of the United States, in *Ricard v. Williams*; <sup>1</sup> in which the court say, "an ouster or disseisin is not, indeed, to be presumed from the mere fact of sole possession; but it may be proved by such possession accompanied with a notorious claim of exclusive right."<sup>2</sup> To make a possession of tenant in common adverse as against the other, it is not necessary that notice should be given of the adverse intent; but the intent must be manifested *by outward acts of an unequivocal kind*.<sup>3</sup> The relation, in fact, between tenants in common is, in principle, very similar to that between lessor and lessee; the possession of one is the possession of the other; but if one oust the other, or denies his tenure, his possession becomes adverse; and so of a trustee or mortgagee.<sup>4</sup> It is from the nature of the estate, that a tenant in common of land, in the enjoyment of his rights, must necessarily, *prima facie*, be in possession of the whole.<sup>5</sup>

430. In the case of *Parker v. Proprietors, &c.*, in Massachusetts, already referred to, it was held, that where part of several tenants in common of land convey their shares thereof by deeds to A, who afterwards executes to B a deed of the whole estate, and B enters claiming the whole, and disseises the cotenants, and then conveys the whole estate to C, who also enters claiming the whole, and the cotenants then make a deed of their shares of the land to D, and he impleads C in a writ of entry, C is not estopped by the deeds of A to set up a title by disseisin. And that if one tenant in common executes a deed of the entire estate, and the

<sup>1</sup> *Ricard v. Williams*, 7 Wheat. (U. S.) 121. And see *Lord v. Gordon*, 2 H. & McHen. (Md.) 254. Where both parties enter by descent from the same common ancestor, a color of title by virtue of such descent cannot be set up by one against the other, whatever may be the effect of a descent in any other case, which the court does not decide. *Midford v. Hardinson*, 8 Murph. (N. C.) 166. And see *Witham v. Perkins*, 2 Greenl. (Me.) 400.

<sup>2</sup> See also *Cullen v. Motzer*, 18 Serg. & Rawle (Penn.), 156, and *Higbee v. Rice*, 5 Mass. 352; *Jackson v. Brink*, 5 Cow. (N. Y.) 488. [*Iddings v. Cairnes*, 2 Grant (Penn.), 88; *Warfield v. Lindell*, 30 Mo. (9 Jones) 272; *Challefoux v. Ducharme*, 8 Wis. 287.]

<sup>3</sup> *Lodge v. Patterson*, 8 Watts (Penn.), 77; *Gillespie v. Osborn*, 3 A. K. Marsh. (Ky.) 77.

<sup>4</sup> *Willison v. Watkins*, 3 Peters (U. S.), 51.

<sup>5</sup> *Knox v. Silloway*, 1 Fairf. (Me.) 201; *Allen v. Hall*, M'Cord (S. C.), 131.

grantee causes the deed to be recorded, and enters into possession claiming title to the entirety, and openly exercises acts of ownership, it is a disseisin of the cotenants, and they cannot subsequently pass their portion of the estate by a deed to a third person. Where one of two tenants in common of land conveyed the whole estate to A by a deed of warranty, and A entered, claiming title to the whole, and, on being requested by the cotenant to give up a moiety thereof, refused so to do, and declared that he would stand a lawsuit before he would give it up, it was held that there was an ouster of the cotenant, which entitled him to maintain a writ of entry against A.<sup>1</sup> In such case, it has been held in Pennsylvania, that the possession of the grantee for the time limited by the statute will bar the cotenant. It has also been expressly held, in New York, that where one of several tenants in common conveys the entire premises held in common, and the grantee enters into possession under the conveyance, claiming title to the whole premises, such possession is adverse to the cotenants of the grantor, and consequently at the expiration of the period of limitation they will be barred.<sup>2</sup> Where one tenant in common, after the death of the other, put up his interest in the land at public sale, and purchased it, and let the whole tract on a lease, and had a survey made in his own name, and received the rents and profits beyond the period limited by the statute, a recovery by the heirs of his cotenant, it was held, was barred.<sup>3</sup> Where lands were devised to a number of persons as tenants in common, and it was verbally agreed between them that one of them should give up his share for a certain compensation to the other devisees, who thereupon entered upon his share, and excluded him from the possession; it was held to be a disseisin of such devisee.<sup>4</sup> But a person who has

<sup>1</sup> *Marcy v. Marcy*, 6 Met. (Mass.) 360. No notice from the grantee is necessary to set the statute in motion. *Weisinger v. Murphy*, 2 Head (Tenn.), 604.

<sup>2</sup> *Bogardus v. Trinity Church*, 4 Paige (N. Y.), Ch. 178. And see *Jackson v. Brink*, 5 Cow. (N. Y.) 488.

<sup>3</sup> *Lodge v. Patterson*, 8 Watts (Penn.), 77.

<sup>4</sup> *Leonard v. Leonard*, 10 Mass. 231. [*Peppard v. Deal*, 9 Barr (Penn.), 140.] Where there has been a tenancy in common, if the tenants in possession only claim the undivided interest which was held by their immediate grantors, it is not adverse to the remaining part of the title, and such persons cannot avail themselves of the statute of limitations. *Clymer's Lessee v. Dawkins*, 8 How. (U. S.) 674. But if the occupants entered into possession and held the land for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not an undivided part thereof in cotenancy, it is an adverse possession, and the statute of limitation is a good plea. *Ibid.*

entered by permission of one tenant in common cannot (a partition having been made) set up an adverse title in bar to an action of ejectment by the tenant in common to whose share the premises have fallen.<sup>1</sup>

431. It was held by Ch. J. Parsons, that "if one cotenant refuses and forbids the entry of the other, and tells him he must get his possession by law, and, as far as words will go, turns him off, it is an ouster."<sup>2</sup> In accordance with this position, where a tenant in common refused to admit his cotenant to enter on the land, or to suffer his agent to occupy, denying his right, and retaining himself the exclusive possession, it was held to be ample evidence of the ouster of his companion.<sup>3</sup> In ejectment by one tenant in common against another, it is a sufficient denial by the defendant of the plaintiff's right that the defendant claims the whole premises as his own, that he has offered to sell the same, and declares that the plaintiff would be compelled in equity to execute a deed given by his brothers and sisters as heirs of their father, in compliance with a contract made with the grantor of the defendant.<sup>4</sup> The refusal of a tenant in common to admit the right of his cotenant, subsequent to the demise made in an action of ejectment, is a sufficient adverse possession, it has been held, in North Carolina, to infer an ouster at the time of the demise.<sup>5</sup>

432. But it is not necessary, in order to prove that a tenant in common has claimed the whole exclusively, that it should be proved that he made an express declaration to that effect; for it may be shown clearly by acts as well as words.<sup>6</sup> Where one enters and takes the profits exclusively and continuously for a long period under circumstances which indicate a denial of a right in any other to receive them, as by not accounting with the acquiescence of the other tenants, an ouster may be presumed, in this country,<sup>7</sup> as well as it has appeared it may in England,<sup>8</sup> under like

<sup>1</sup> *Jackson v. Creal*, 18 Johns. (N. Y.) 174.

<sup>2</sup> *Gordon v. Pearson*, 1 Mass. 323.

<sup>3</sup> *Brackett v. Norcross*, 1 Greenl. (Me.) 89.

<sup>4</sup> *Valentine v. Northrop*, 12 Wend. (N. Y.) 404.

<sup>5</sup> *Hargrave v. Powell*, 2 Dev. & Batt. (N. C.) 97.

<sup>6</sup> *Law v. Patterson*, 1 Watts & Serg. (Penn.) 191; *Brackett v. Norcross*, 1 Greenl. (Me.) 89.

<sup>7</sup> *Frederick v. Gray*, 10 Serg. & Rawle (Penn.), 182. [*Simmons v. Nahant*, 8 Allen (Mass.), 816; *Lefavour v. Homan*, 8 Allen (Mass.), 854; *Sydnor v. Palmer*, 29 Wis. 226; *Cain v. Furlow*, 47 Ga. 675.]

<sup>8</sup> *Peaceable v. Read*, 1 East, 568, cited *ante*, p. 461.

circumstances. This is a question which has been learnedly discussed on several occasions by the judges in Pennsylvania. It was held on one occasion to be error to charge the jury that a receipt of profits merely may be sufficient to found a legal presumption of actual ouster. But such receipt for a great length of time, according to Gibson, Ch. J., may indeed raise not only a legal but a natural presumption of it passing with the jury for what it is worth, and operating no further than it happens to produce actual conviction of the fact.<sup>1</sup> In another case in the same State, it was held that between tenants in common a presumption of ouster arises in favor of one who has been in the exclusive and peaceable possession of the profits for the time limited by the statute.<sup>2</sup> But nothing short of an exclusive perception of the profits would justify the court in submitting to a jury to presume an ouster or disseisin for the purpose of defeating an action of partition.<sup>3</sup> The dictum in *Hart v. Gregg*,<sup>4</sup> that a claim of exclusive right, attended by a receipt of all the profits, is insufficient to let in a presumption of ouster, is not easily maintainable against preceding decisions in Pennsylvania.<sup>5</sup>

433. It has been laid down by Ch. J. Marshall as the opinion of the court, that a silent possession of one cotenant, accompanied with no act which will amount to a notice to his cotenant that his possession is adverse, ought not to be construed into an adverse possession.<sup>6</sup> Still he did not probably mean to deny that a jury

<sup>1</sup> *Bolton v. Hamilton*, 2 Watts & Serg. (Penn.) 294.

<sup>2</sup> *Mehaffy v. Dobbs*, 9 Watts (Penn.), 868. In relation to this case, it was said by Gibson, Ch. J., in *Bolton v. Hamilton*, 2 Watts & Serg. 299, that it is perhaps not to be maintained, that a jury is bound to raise a legal presumption of ouster from an exclusive actual possession of a tenant in common.

<sup>3</sup> *Galbreath v. Galbreath*, 5 Watts (Penn.), 146.

<sup>4</sup> *Hart v. Gregg*, 10 Watts (Penn.), 190.

<sup>5</sup> *Bolton v. Hamilton*, 2 Watts & Serg. (Penn.) 299. [The owner of a farm died in 1778. One of his sons, then seventeen, carried on the farm, living then with the coheirs, until 1798, when the other heirs went away, and, his sisters having married, he continued in possession and management of the farm till his death in 1822, without, however, so far as appeared, ever having made a claim of title to the whole farm. It was held that he acquired no title by adverse possession. *Campbell v. Campbell*, 18 N. H. 488. If one tenant mortgage the whole estate, it is not conclusive evidence of an ouster of his cotenants. *Wilson v. Collishaw*, 18 Penn. St. (1 Harris) 276. An undivided interest of a tenant was sold on execution and purchased by his cotenant, and it was held, that the purchase by the cotenant was an admission of the tenant's interest which prevented him from claiming title under the statute of limitations. *Smith v. Kincaid*, 10 Humph. (Tenn.) 78.]

<sup>6</sup> *M'Clung v. Ross*, 5 Wheat. (U. S.) 116. [*Villard v. Robert*, 1 Strobb. (S. C.) Eq. 893.]

might not be warranted by very great length of time to presume an adverse possession.<sup>1</sup> It is true, say the Supreme Court of Massachusetts, that, if a tenant in common continues in possession for a great length of time, without interruption or claim of the other tenants, this would be evidence from which a jury would be authorized to infer or presume an actual ouster; and so on similar evidence a grant may be presumed.<sup>2</sup> It is held in North Carolina, that the sole enjoyment of the property by the tenant in common is not of itself an ouster of his cotenant, the possession of one being the possession of all. But the sole enjoyment for a great number of years, without claim from another having right, and under no disability, becomes evidence of title, and raises the legal presumption of an ouster.<sup>3</sup> An exclusive and uninterrupted possession for *forty years* by one tenant in common, it has been held in New York, will authorize a jury to presume an ouster.<sup>4</sup> It has been decided in Kentucky that a possession of thirty-six years, without any account or demand set up by the cotenants, was sufficient to presume an actual ouster.<sup>5</sup> In a case in Pennsylvania, a plaintiff who was entitled, in right of her mother, to one-fourth part of the remainder in fee of a tract of land, subject to the life-estate of her father as tenant by the curtesy of the whole, received from her father a conveyance in fee of one-half, having previously entered into possession of one end of the tract, cleared a portion of it, erected buildings, and enclosed it. On the death of the father, the defendant, a brother of the plaintiff, took possession of the remaining half of the tract, and exercised acts of ownership over it exclusively of the plaintiff, who continued to hold the other end in severalty for *forty years*, setting up no claim to the possession of the half occupied by the defendant. This was held to be a sufficient ouster, and that the plaintiff was consequently barred from recovering her interest in the half of the tract occupied by the defendant.<sup>6</sup> A and B were tenants in common by agreement and payment of equal parts of the purchase-money; B was in possession, and died; his children entered and occupied it as their own,

<sup>1</sup> According to the opinion of Lord Mansfield, in *Doe v. Prosser*, Cowp. 217, cited *ante*, p. 460, 461.

<sup>2</sup> *Parker v. Proprietors of Locks, &c.* 8 Met. (Mass.) 100.

<sup>3</sup> *Thomas v. Garvan*, 4 Dev. (N. C.) 223; *Cloud v. Webb*, Ib. 290.

<sup>4</sup> *Jackson v. Whitbeck*, 6 Cow. (N. Y.) 632.

<sup>5</sup> *Chambers v. Pleak*, 6 Dana (Ky.), 482.

<sup>6</sup> *Gregg v. Blackmore*, 10 Watts (Penn.), 192.



without any knowledge of the title of A. The possession, it was held, for the time limited, barred the claim of A.<sup>1</sup>

434. As one cotenant cannot be disseised of any particular part of the land, unless all are disseised,<sup>2</sup> so the relinquishment and yielding up to one of several tenants in common, by the disseisor, after a disseisin of five years, of all the right, seisin, possession, and betterments which the disseisor had in and to the proportion of that tenant in common in the premises, has the effect to put *all the tenants in common*, in the seisin and possession of their shares respectively, and to prevent the operation of the statute of limitations against any of them prior to that time.<sup>3</sup> Where there were several tenants in common of a tract of land, some of whom were infants, and the attorney in fact of the guardian of the infants made known their claim to the settler, who agreed to pay the taxes and keep possession for the infants, without committing waste, it was held that this agreement inured for the benefit of the other tenants in common, so as to prevent the statute from running against them.<sup>4</sup>

435. All acts done by one tenant in common are to be done for the interests of all the cotenants, and in conformity to their rights, until an adverse possession is notoriously set up and established by competent proofs.<sup>5</sup> S. gave a deed of release of his interest, as a tenant in common, in certain premises to B.; at the time of the conveyance W. was in possession and seisin of the premises, claiming them in his own right, by virtue of a purchase under a tax sale. W. was one of the tenants in common of the premises, and was the agent of S. and the other proprietors. Held that the purchase of W. must be deemed a trust for the benefit of S. and his grantee B., to the extent of their interests; that he ought to be decreed to convey the legal title to the premises, after being satisfied of all just claims, which he had against them for taxes, for the

<sup>1</sup> *Brown v. M'Coy*, stated by Huston, J., in *App v. Driesbach*, 2 Rawle (Penn.), 305, and reported in 2 Watts & Serg. (Penn.) 307, in note (2 Penn. Dig. 224). Where a tenant in common enters and cuts timber, he is presumed to enter under his legal title, there being no other evidence of any ouster of the cotenants. *Whiting v. Dewey*, 15 Pick. (Mass.) 428; *Shumway v. Holbrook*, 1 Ib. 114.

<sup>2</sup> *Porter v. Hill*, 9 Mass. 34.

<sup>3</sup> *Vaughn v. Bacon*, 3 Shep. (Me.) 455. And see *Farrar v. Eastman*, 1 Fairf. (Me.) 191.

<sup>4</sup> *Creswell v. Altemus*, 7 Watts (Penn.), 566; and see also *Graffius v. Tottenham*, 1 Watts & Serg. (Penn.) 488.

<sup>5</sup> *Baker v. Whiting*, 3 Sumn. (Cir. Co.) 476.

purchase-money laid out in the tax sale, for his expenditures and improvements upon them, and also for his reasonable services as agent in the premises, deducting all sums of money received by him in the premises, for what (in the language of the country) is called "stumpage," or otherwise.<sup>1</sup> Where two non-residents held in common an unsettled tract of land, which without their knowledge was sold for the non-payment of taxes, and they afterwards made partition by mutual deeds of release and quitclaim, in common form, after which one of them, within the time of redemption, paid the tax to the purchaser at the sheriff's sale, from whom he took a deed of release and quitclaim to himself alone of the whole tract; it was held that this payment and deed inured to the benefit of them both; and that he who had not paid might maintain an action against the other for his part of the land.<sup>2</sup>

436. It has been held by a majority of the court, in a case in New York, that where an adverse possession is relied on, the plaintiff may produce evidence to show that the person whose possession is set up as adverse, entered claiming to be tenant in common, under the same title with those through whom the plaintiff claims, without being at the same time obliged to admit the fact that the adverse claimant was a tenant in common with him.<sup>3</sup> But from this opinion Kent, Ch. J., dissented, and held that "the admission of a tenancy in common, under the same title, is not an admission that the plaintiff partook of that title. Nothing is more common than for adverse parties in ejectment to claim under the same title; yet the entry of one party is not the entry of the other, but upon the assumption that they are cotenants in the same title and interest. They may be sharers in that interest in very different degrees and proportions, but still there must be a cotenancy to establish the privity."

<sup>1</sup> *Baker v. Whiting*, 3 Sumn. (Cir. Co.) 476.

<sup>2</sup> *Williams v. Gray*, 3 Greenl. (Me.) 207.

<sup>3</sup> *Smith v. Burtis*, 9 Johns. (N. Y.) 174.

## CHAPTER XXXIII.

## LANDLORD AND TENANT.

437. THE law in respect to possession as between landlord and tenant is, that the possession of the tenant, like that of one of several tenants in common, is *prima facie* a permissive one,<sup>1</sup> and consequently affords of itself no presumption of an adverse holding.<sup>2</sup> It has been considered, too, as a branch of the law respecting reversioners, though there are some peculiar considerations applicable to the former.<sup>3</sup> By the term *landlord*, says the learned annotator just referred to in the note below, is, as he understands, “a reversioner in the actual receipt of the rent of the land.” No time, as has been shown in a former chapter, runs against a reversioner during the continuance of the estate of him who has been constituted tenant for life or years,<sup>4</sup> and so no time runs against a lessor, whether the lessee be a tenant for years under a written lease, or whether he be a tenant at will or at sufferance. It is an invariable rule of the common as well as of the civil law, that those who possess, not for themselves, but in the name of another who is acknowledged as owner, cannot acquire the legal possession, because at the commencement of the possession they had not the *intention* of possessing for themselves, but for another.”<sup>5</sup> “Unless the lessee,” says Lord Ellenborough, “by a formal act, renounces the lessor’s title, his possession can never be adverse; and, if it were otherwise, the security of landlords would be infinitely endangered.”<sup>6</sup> “It is the settled law of this country,” in the language of the learned Ch. J. Tilghman, “that a tenant shall not resist the recovery of his landlord, by virtue of an adverse title acquired during his lease.” The principle he asserted was founded on sound policy, because it had a tendency to encourage honesty

<sup>1</sup> [The possession of the tenant is that of his landlord. *Titons v. Emery*, 17 N. H. 536.] As to permissive possession, see *ante*, § 384.

<sup>2</sup> *Goodtitle v. Newman*, 3 Wils. 521; *Willison v. Watkins*, 8 Peters (U. S.), 43; *Bradstreet v. Huntingdon*, 5 Ib. 402; *Ricard v. Williams*, 7 Wheat. (U. S.) 59.

<sup>3</sup> 2 Smith’s Leading Cases, 407, contained in 44 Law Lib. 408.

<sup>4</sup> See *ante*, Ch. XXX.

<sup>5</sup> Civil Code of Louisiana, p. 689.

<sup>6</sup> *Balls v. Westford*, 2 Campb. 11.

and good faith between landlord and tenant.<sup>1</sup> In the language of the Supreme Court of the United States: "It is an undoubted principle of law fully recognized by this court, that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of a lease or tenancy. The principle of estoppel applies to the relation between them, and operates with full force to prevent the tenant from violating that contract by which he claimed and held the possession. He cannot change the character of the tenure by his own act merely, so as to enable himself to hold against his landlord, who reposes under the security of the tenancy, believing the possession of the tenant to be his own, held under his title, and ready to be surrendered by its termination."<sup>2</sup> Where the plaintiff and defendant were, with other children, devisees of the real estate of their father, and the defendant was, at the time of his father's death, tenant of the land under a lease, which did not expire until five years after the death of the testator, and three years after the father's death, the defendant and the other devisees made a partition of the real estate to the exclusion of the plaintiff, and the defendant continued in exclusive possession for more than the time limited by the statute, after the death of the testator, it was held that the statute did not begin to run until the expiration of the lease, notwithstanding the adverse holding under the partition.<sup>3</sup>

438. In the case of a lease given for a great number of years, even if no part of the rent reserved has been paid by the lessee, or his representative, within the time limited for the right of entry, to the lessor, or his representative, the right of entry is not defeated.<sup>4</sup> Thus, where it was contended that an abandonment of title was to be presumed, inasmuch as there was no proof of the payment of rent, nor of any acknowledgment of tenancy within twenty years, the court held there was a material distinction between the presumption of payment of money and the execution of a release, or

<sup>1</sup> *Galloway v. Ogle*, 2 Binn. (Penn.) 468. [*Delancey v. Ganong*, 5 Selden (N. Y.), 9.]

<sup>2</sup> *Willison v. Watkins*, 8 Peters (U. S.), 48.

<sup>3</sup> *Shepley v. Lyttle*, 6 Watts (Penn.), 500. See also *Cholmondeley v. Clinton*, 2 Meriv. Ch. 284; *Hoveden v. Lord Annesley*, 2 Sch. & Lefr. Ch. 638; *Hodson v. Sharp*, 10 East, 850; *Jackson v. Reynolds*, 1 Caines (N. Y.), 144; *Jackson v. Whitford*, 2 Ib. 215; *Jackson v. Sternberg*, 1 Johns. (N. Y.) Ca. 153; *Straw v. Jones*, 9 N. H. 400; *Stearns v. Godfrey*, 4 Shep. (Me.) 158.

<sup>4</sup> *Orrell v. Maddox*, reported in App. p. 1 to Runn. on Eject. And so held by Lord Redesdale in *Saunders v. Annesley*, 2 Sch. & Lefr. 106.

the extinguishment of a right to rent. And that such release and extinguishment could only be by deed. And the doctrine was fully recognized by the court in this case, that when the relation of landlord and tenant had been once established under a *sealed lease*, the mere circumstance that the landlord has forborne to demand rent will not justify the presumption that he has forfeited his right to it.<sup>1</sup> The right of a tenant or one claiming under him to set up an adverse possession, it was held in another case, does not depend upon the landlord's right to receive rent, but upon the power to enter. Accordingly the decision was that where the defendant in ejectment set up an adverse possession in one, who, as was shown, entered under the plaintiff's ancestor, by virtue of a lease for years reserving an annual rent, it was held that the lease was sufficient to repel the defence, though the circumstances were such as to warrant the presumption of an extinguishment of the entire rent shortly after the term commenced.<sup>2</sup> It has been held, moreover, that if a lease contains a clause of *re-entry* in case of the non-payment of the rent reserved, and there has been no payment or re-entry for twenty years, the right of entry is still preserved.<sup>3</sup>

<sup>1</sup> *Jackson v. Davis*, 5 Cow. (N. Y.) 123.

<sup>2</sup> *Failing v. Schenck*, 8 Hill (N. Y.), 844. W., in 1785, leased from M. and A. for ninety-nine years, renewable for ever, a lot of ground, at a fixed annual rent, and covenanted in the lease to pay the rent. He entered upon the land, and paid the rent until 1808. The lease was not legally acknowledged or recorded. In 1812, M. and A. brought an action of *covenant at law* against W., to recover the rent then due, and failed, *because* of the defective execution and acknowledgment of the lease. W., and those claiming under him, remained in undisturbed possession of the property. In 1813, M. and A. filed their bill in chancery against W., to compel him to account for the rents from 1803, and to accept a new lease formally executed. W. afterwards died, and the suit was revived against his executors. Held, that the complainants were entitled to recover the rents, with interest, and that neither the judgment at law, nor the *act of limitations*, could affect their claim; but that the executors of W. were not bound to accept a new lease. *Williams's Executors v. Annapolis*, 6 H. & Johns. (Md.) 529.

<sup>3</sup> *Doe v. Danvers*, 7 East, 299. By statute of 8 & 4 Will. IV., a lessor is a reversioner agreeably to the third section; and it has been accordingly held that, by a discontinuance of the receipt of the rent alone, for more than twenty years, he is not prevented from recovering the premises at any time within twenty years from the determination of the lease. Neither does the discontinuance of the receipt of the rent for more than twenty years amount to a forfeiture of the lessor's right to the arrears of rent, as the second section does not apply to rent on a demise; but the lessor may recover the arrears for twenty years, or for six years; for the former if under seal, and for the latter if by parol. *Davy, dem. v. Oxenham*, 7 Mees. & Welsb. (Ex.) 181; *Grant v. Ellis*, 9 Ib. 118. And see Appendix, p. xvii. and p. xxvii. It is a settled rule of the common law that, where a right of re-entry is claimed on the ground of

439. On the principle that a tenant shall not resist the recovery of his land by an adverse title acquired by possession, it has been held in England that if a cottage is built upon a manor by the lord's permission (or any acknowledgment has ever been made though it were a hundred years since) the statute of limitations will not run against the lord. In such a case the cottager is deemed a tenant at will.<sup>1</sup> Where, also, the defendant enclosed a small piece of waste land, by the side of a public highway, and occupied it for thirty years without paying any rent, and at the expiration of that time the owner demanded sixpence rent, which was paid on three several occasions, it was held that this, in the absence of other evidence, was conclusive to show that the occupation of the defendant began by permission, and entitled the plaintiff to a verdict. The payment of the rent was treated by the court as conclusive evidence that the former occupation by the defendant was a permissive, and not an adverse, occupation.<sup>2</sup> By the statute of 8 and 4 Will. IV., in the case of a tenancy at will, the limitation begins at the termination of the tenancy, and the tenancy at will shall be deemed to have determined at the expiration of one year after the commencement of such tenancy.<sup>3</sup>

440. The possession of a defendant, after a sale under an execution, is not deemed adverse, for he becomes *quasi* a tenant at will to the purchaser.<sup>4</sup> The repeated acts of the defendant, recogniz-

forfeiture for non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before the sunset on the day when the rent is due, upon the land, in the most notorious place of it, even though there be no person on the land to pay. 1 Saund. 287 (note 16); Connor v. Bradley, 1 How. (U. S.) 211. It was held in South Carolina, that after a *very great* lapse of time, and an omission to pay rent, a dissolution of the relation of landlord and tenant may be presumed. Moore v. Turpin, 1 Spear (S. C.), 82 (Court of Appeals).

<sup>1</sup> Bull. N. P. 104.

<sup>2</sup> Doe v. Wilkinson, 8 Barn. & Cress. 185. And see Fenner v. Duplock, 2 Bing. 10. [In Doe v. Bickett, 12 L. J., n. s. 286, Q. B., s. c. 7 Jurist, 532, the following answer made to an agent of the landlord by the tenant, "I have no property in W. but what I hold of Lord S., for which I pay £100 a year," was held sufficient evidence of payment if not under § 8, of 8 and 4 Will. IV., c. 27, to prevent an adverse right running against the landlord.]

<sup>3</sup> See comments on this part of the act, Appendix, p. xxvii.

<sup>4</sup> Jackson v. Sternberg, 1 Johns. (N. Y.) Cases, 158; Russell v. Doty, 4 Cow. (N.Y.) 576. And see Langdon v. Potter, 8 Mass. 128. But in McRae v. Smith, 2 Ray (S. C.), it was held that possession of land five years, under a sale from defendant, who has judgment against him, will be a good bar against a judgment creditor or those claiming under him, who has lain by that time without reviving his judgment, or bringing suit against such possessor.

ing the plaintiff's title by applications to purchase from him, both before and after he entered into possession of the premises, afford the strongest reason to presume that the defendant was in possession under a lessor.<sup>1</sup>

441. A mere holding over, after a term ended, is not evidence of an adverse possession, unless the tenant show that since the expiration of the lease he has held forcibly, or set up an adverse right.<sup>2</sup> Thus, in the case of the manor of Beddington, the lessors of the plaintiffs, who were lords of the manor, sought to recover the lands as parcel of the manor, against the defendant, who was rector of the parish, and claimed them as parcel of the rectorial glebe. The lords of the manor had a right of presentation to the rectory, and were also entitled to a portion of the tithes. At various times there had been a mutual exchange of lands, and tithes between the lords of the manor and the rector, which had given rise to much confusion concerning their respective rights. To prove possession in the lessors of the plaintiff, a deed was produced, dated in 1703, by which the then lord of the manor demised to the rector the lands in question for forty years, reserving a certain rent; and the rector covenanted with the lessor that he and his heirs should have the tithes of oats of the parish. The rectors continued to hold the possession after the expiration of the lease, but withheld the rents for upwards of twenty years; the lords of the manor continuing to take the tithe of oats. The court was of opinion, that possibly, at the time when the rent was withheld, it was agreed between the then rector and the lord of the manor, that, if the latter were permitted to receive the tithe as before, the former should be permitted to retain the land demised; and therefore, that the possession of the land by the rector was not adverse, so as to let in the operation of the statute of limitations.<sup>3</sup> B, being in possession of land under a lease for thirty-one years, made in the year 1753, continued in possession till 1811. No rent had been paid, nor any *act* done by B, acknowledging a tenancy after the expiration of the lease in 1784. It was held that after the expiration of the lease the possession of B was that of a tenant at sufferance, and that there was no adverse possession by B, against the lessor in the lease in those claiming under him. After the

<sup>1</sup> Jackson v. Croy, 12 Johns. (N. Y.) 480.

<sup>2</sup> Gwynn v. Jones, 2 Gill & Johns. (Md.) 178.

<sup>3</sup> Roe v. Ferrars, 2 Bos. & Pull. 542.



death of B, in 1811, the defendants entered into possession of the land, and continued in possession without any act of acknowledgment of a tenancy, till the bringing of the action of ejectment, which was within twenty years from the death of B. This possession, also, it was held, was no bar under the statute of limitations.<sup>1</sup>

442. It seems to be also settled that, when the relation of landlord and tenant is once established, it attaches to all who may succeed the tenant, immediately or remotely; and that a succeeding tenant is as much disqualified to set up his possession against the original landlord, as the first tenant.<sup>2</sup> And a holding over of forty years, although the original tenant died in possession, and was succeeded therein by his son, the latter of whom paid no rent, was adjudged not adverse to the true owner.<sup>3</sup> In this case, the tenant originally entered under a lease commencing in 1758, and which expired in 1761, and at the expiration of the lease there was no entry by the lessor, nor any acknowledgment of his title. The action was commenced in 1801; and the opinion of the court was as follows: "When a person enters under another, and transfers the possession, his grantee is supposed to hold under the same title. Although the lease be expired, he will be regarded as holding by consent of the original landlord, and as his tenant at will; unless he can show that, since the expiration of it, he has acquired a new title, either from or paramount to that of the party under whom possession was taken. J. Marshall, the father, it is admitted, held under Fitch. He therefore would not, under this rule, on his mere possession, be permitted to prevail against the title of one acknowledged by himself. The presumption that he continued to hold under Fitch is a reasonable one, nor would it work any hardship to him, as it would not preclude him from showing a better title, when he had continued in so long after the lease had

<sup>1</sup> Al. & Nap. (Irish) Exch. 217. At the expiration of his term a tenant for years becomes, by continuing in possession, a tenant at sufferance. *Wilde v. Cantillon*, 1 Johns. (N. Y.) Cas. 124; *Jackson v. Raymond*, Ib. 86 (*in notis*); *Lion v. Burtis*, 2 Wend. (N. Y.) 166, and 20 Johns. (N. Y.) 491.

<sup>2</sup> *Graham v. Moore*, 4 Serg. & Rawle (Penn.), 467; *Cooper v. Smith*, 8 Watts (Penn.), 586. Purchaser of tenant's right, at a sheriff's sale, assumes his relation with all its legal consequences. *Willison v. Watkins*, 3 Peters (U. S.), 43. [And where the tenant in possession dies, adverse possession, as against his title, does not commence till the appointment of an administrator. *Miller v. Sarls*, 19 Ga. 881.]

<sup>3</sup> *Brandter v. Marshall*, 1 Caines (N. Y.), 394. [The widow of a tenant for life does not hold adversely, not even after she has married again. *Bannon v. Brandor*, 84 Penn. St. 263; *Frazer v. Naylor*, 1 Met. (Ky.) 598.]

expired. The possession, therefore, in 1774, when J. Marshall died, must be considered as that of Fitch. The next question relates to the proof of the present defendant holding under his father. The testimony was sufficient to go to the jury, and we think they have drawn the proper conclusion."<sup>1</sup>

443. It has been considered that a conveyance of the demised premises by the tenant does not operate as the basis of an adverse possession, so as to bar the landlord of his ejectment, whether the grantee was knowing to the demise or not. For the sake of the remedy, the landlord may consider the grantee as a disseisor, though the tenant cannot constitute himself so in spite of his landlord.<sup>2</sup> Thus, it was said by Lord Mansfield, that if the lessee for life or years makes a feoffment, the lessor may still distrain for the rent, or charge the person to whom it is paid as a receiver, or bring an ejectment, and choose whether he will consider himself as disseised.<sup>3</sup> This rule is to be applied, however, only to the conventional relation of landlord and tenant, where rent is reserved, or a return required; and not to a relation arising from mere operation of law, as where one makes a grant, and, by the omission of the technical words "heirs," an estate for life only passes. In such a case, after the death of tenant for life, it is held that an adverse possession may commence.<sup>4</sup>

444. But although it is well settled as a general rule, that a person is estopped to deny the title of his landlord, and though a person once a tenant will *prima facie* be deemed to continue in that character so long as he remains in the occupation of the land demised, yet it is competent for such person to show that the relation has been dissolved. And upon this showing the tenant will be permitted to controvert the title under which he formerly held. As where tenant at will remained, after the death of the landlord, in the exclusive and uninterrupted possession of the land, claiming it as his own for a period of fifty-seven years, it was held that the jury were authorized to presume a restoration of the land to the heirs of the lessor, and then an actual ouster of them immediately after the death of the lessor, thereby dissolving the relation which

<sup>1</sup> See also *Jackson v. Miller*, 6 Cow. (N. Y.) 751.

<sup>2</sup> *Jackson v. Davis*, 5 Cow. (N. Y.) 123.

<sup>3</sup> *Atkyns ex dem. Taylor v. Horde*, 1 Burr. 112. And see *Newman v. Rutter*, 8 Watts (Penn.), 54.

<sup>4</sup> *Jackson v. Harsan*, 7 Cow. (N. Y.) 823.

at first subsisted. And that consequently by virtue of such possession, the party acquired a perfect title.<sup>1</sup> The Supreme Court of the United States liken the relation of landlord and tenant to the relation of mortgagor and mortgagee, and consider that there is no more propriety in refusing a lessee, who has openly disavowed the title of the landlord, the protection of the statute, than there is any other fraudulent trustee, from the time the fraud is discovered. There is no rule of law or equity which makes it a matter of duty to refuse to do it.<sup>2</sup> All the cases, however, show that every presumption in such case is in favor of possession in subordination to the title of the true owner, and that the adverse possession must be made out, not by any inference, but by a clear and positive proof of a claim on the part of the tenant, and of an *acquiescence* on the part of the landlord, who is knowing to the same.<sup>3</sup>

445. If the tenant has *attorned* to a third person, and the landlord has assented to such attornment, and thereby disclaimed any title in himself, the tenant from that time may set up his possession as adverse to the landlord.<sup>4</sup> Thus, in a case which involved a question of title between the V. S. and the K. patents, in the State of New York, the plaintiff attempted to recover on the ground of the tenancy of the defendant. But it appeared that the defendant, after it had been decided that his lot belonged to the K. patent, and not to the V. S. patent, under which he originally entered, had purchased of the K. proprietors. It also appeared that the lessors of the plaintiff had declared, that he had given up all claim to the land, and that he did not blame the defendant for having purchased under the K. patent. The court held, that, under these circumstances, the lessor of the plaintiff must be deemed to have been privy to, and to have assented to, the defendant's attornment to the proprietors of the K. patent; and that the plaintiff could not recover on the ground of the prior ten-

<sup>1</sup> *Camp v. Camp*, 5 Conn. 291. And see *Jackson v. Davis*, 5 Cow. (N. Y.) 123; *Moore v. Turpin*, 1 Spear (S. C.), 32 (Court of Appeals); *Duke v. Harper*, 6 Yerg. (Tenn.) 280; *Phillip's Lessee v. Robertson*, 2 Tenn. 399.

<sup>2</sup> *Willison v. Watkins*, 3 Peters (U. S.), 43; and see *Blight's Lessee v. Rochester*, 7 Wheat. (U. S.) 535. [*Longwood v. Bentley*, 3 Grant (Penn.), 177; *Sherman v. Champlain Transportation Co.*, 31 Vt. (2 Shaw) 162; *Bannon v. Brandon*, 34 Penn. St. 263.]

<sup>3</sup> See *ante*, Ch. XXXI. § 384. [*Zellar v. Eckhart*, 4 How. (U. S.) 289; *Rabe v. Fyler*, 10 S. & M. (Miss.) 440; *Rigg v. Cook*, 4 Gilm. (Ill.) 336.]

<sup>4</sup> *Jackson v. Davis*, 6 Cow. (N. Y.) 133.

ancy of the defendant.<sup>1</sup> The intention, says Lord Redesdale, of the act of limitations being to quiet the possession of lands, it would be curious if a tenant for ninety-nine years, attorning to a person insisting he was entitled, and disavowing the tenure to the knowledge of his former landlord, should protect the title of the original lessor for the term of ninety-nine years. That would, he thought, be too strong to hold, on the ground of the possession being in the lessor, after the tenure had been disavowed to the knowledge of the lessor.<sup>2</sup> In another case: "When," says the Master of the Rolls, "is the right to recover possession of land, subject to a lease, to be considered as having accrued? Not from the time when any person dealing with the leases, or dealing with those entitled to the leases, gets possession and claims to be entitled in fee, but from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease; for then the adverse title of the person who receives the rent, under such circumstances, is first really brought into operation against the party who claims, on the expiration of the lease."<sup>3</sup>

446. But where the tenant of land for a year held over, and after the expiration of his term paid rent to a stranger, and refused to quit the premises, being called upon by the agent of the lessor for that purpose, this was held to be no disseisin of the lessor, not even at his election, nor such as would prevent the operation of a deed from the lessor to a third person.<sup>4</sup> Indeed, unless there has been an attornment to a third person, by the landlord's *knowledge* and *acquiescence*, the tenant will not be admitted to prove a parol disclaimer merely, on the part of the landlord, of the relation subsisting between them. As, where the defendant, who, it was shown, entered as tenant, offered to prove that the lessors had disclaimed any right to the premises, the court said, that such a disclaimer as was there set up could be of no validity, and that such evidence, if admissible, would lead to fraud and perjury.<sup>5</sup> And

<sup>1</sup> Jackson v. Welden, 8 Johns. (N. Y.) 288.

<sup>2</sup> Hoveden v. Ld. Annesley, 2 Sch. & Lefr. 629.

<sup>3</sup> Chadwick v. Broadwood, 8 Beav. Ch. 816 (Rolls Court).

<sup>4</sup> Porter v. Hammond, 8 Greenl. (Me.) 188.

<sup>5</sup> Jackson v. Van Vosburgh, 7 Johns. (N. Y.) 186; Jackson v. Kisselbrack, 10 Ib. 886.

the doctrine has frequently been reiterated,<sup>1</sup> that evidence of a parol disclaimer of title to real property is inadmissible, on the ground of being in direct hostility to the principle of the statute of frauds.

<sup>1</sup> *Brandt v. Livermore*, 10 Johns. (N. Y.) 858; *Jackson v. Carey*, 16 Ib. 805; *Jackson v. Davis*, 5 Cow. (N. Y.) 128. The rule that the tenant cannot resist the title of his landlord is not applicable, it seems, in Pennsylvania, where the title of such landlord is a Connecticut title, existing in violation of the laws of Pennsylvania. The tenant, therefore, after purchasing a Pennsylvania title, and continuing to hold under it, may set it against his original landlord, who claimed under a Connecticut title, though subsequently to such purchase the landlord also took out another Pennsylvania title. *Satterlee v. Matthewson*, 18 Serg. & Rawle (Penn.), 138. The following provisions in relation to the doctrine of prescription are from the Civil Code of Louisiana, t. 28, c. 4, p. 701. They are admirably expressed, and correspond pretty nearly to the rules laid down as the common law : —

“ART. 3476. Those who possess for others, and not in their own name, cannot prescribe, whatever may be the time of their possession. Thus farmers, depositaries, usufructuaries, and all those generally who hold by a precarious tenure, and in the name of the proprietor, cannot prescribe on the thing thus held.

“ART. 3477. The heirs of the persons holding under the persons mentioned in the preceding article cannot prescribe, any more than those from whom they held such things.

“ART. 3478. Notwithstanding what is said in the two preceding articles, precarious possessors and their heirs may prescribe, when the cause of their possession is changed by the act of a third person; as if a farmer, for example, acquires from another the estate which he rented; for, if he refuse afterwards to pay the rent, — if he declare to the lessor that he will no longer hold the estate under him, but that he chooses to enjoy it as his own, — this will be a change of possession by an external act, which shall suffice to give a beginning to the prescription.

“ART. 3479. Those to whom tenants, depositaries, and such other persons having only a precarious possession have conveyed the same by a title capable of transferring property, may prescribe for the same.

“ART. 3480. One cannot prescribe against his own title, in this sense, that he cannot change, by his own act, the nature and the origin of his possession. Thus, he whose possession is founded on a contract of lease, which is adduced, is considered as always possessing by the same title, and cannot prescribe by any length of time.

“ART. 3481. The rule contained in the preceding articles is to be understood in this sense, that a man cannot prescribe against an essential part of the contract. Thus, the creditor of an annuity cannot prescribe against the right of redemption; but one may prescribe beyond his title. So also a person who has a title for one half an estate may prescribe for the other half; for it may be that a new title has transferred the property to him, or that he has acquired it without title by thirty years' possession.”

## CHAPTER XXXIV.

## MORTGAGOR AND MORTGAGEE.

447. THE principle that a tenant cannot dispute the title of his landlord, either by setting up a title in himself or a third person, during the existence of the lease of tenancy, it has been considered, applies to mortgagor and mortgagee.<sup>1</sup> Upon the execution of the conveyance by which a mortgage is created, the legal freehold and inheritance, or the legal estate for the term of years created by the mortgage, is construed to be immediately vested in the mortgagee. As, however, the actual occupation and possession of the lands is not always given to the mortgagee, but on the contrary a clause is sometimes inserted in the mortgage, that until default is made in payment of the mortgage money, or of the interest, the mortgagor shall retain the possession and receive the rents, he becomes in many respects tenant at will to the mortgagee.<sup>2</sup> And it is said, that, where there is a proviso that the mortgagor shall continue in possession for the number of years given for the repayment of the mortgage money, he will then be tenant for years.<sup>3</sup>

448. The doctrine that the mortgagor is tenant at will to the mortgagee has, however, been frequently discussed, and it is very clear, that, although some of the qualities of a tenancy at will subsist between a mortgagor and mortgagee, yet in others they differ.<sup>4</sup> A mortgagor, said Lord Mansfield, is not properly a tenant at will to the mortgagee, for he is not to pay him rent. He is only *quodam modo*. Nothing, said his lordship, is more apt to confound than a simile. When the court, or counsel, call a mortgagor a

<sup>1</sup> Willison v. Watkins, 8 Peters (U. S.), 48.

<sup>2</sup> 2 Cruise, 107; Newman v. Chapman, 2 Rand. (Va.) 98.

<sup>3</sup> Powsely v. Blackmon, Cro. Jac. 659.

<sup>4</sup> Birch v. Wright, 3 T. R. 879; Jackson v. Green, 4 Johns. (N. Y.) 186; Jackson v. Fuller, Ib. 214; Simpson v. Ammons, 1 Binn. (Penn.) 176; Wharf v. Howell, 5 Ib. 504; Rockwell v. Bradley, 2 Conn. 1; Wakeman v. Barnes, Ib. 455; Ellis v. Paige, 1 Pick. (Mass.) 48; Wilder v. Houghton, Ib. 89; Cholmondeley v. Clinton, 2 Merivale, 172.

tenant at will, it is barely a comparison. He is like a tenant at will. The mortgagor receives the rent by a tacit agreement with the mortgagee, but the mortgagee may put an end to this agreement when he pleases.<sup>1</sup>

449. But, however wanting in exact resemblance may be the relation of a mortgagor to the relation of a tenant at will, all the authorities have concurred in the opinion, that the possession of the mortgagor is not hostile, or adverse to the mortgagee. Thus it was laid down by Mr. Ch. J. Parsons, that, if the mortgagor remains in possession, it is not a disseisin of the mortgagee, who may convey the lands mortgaged to a third person, who shall thereupon be seised of the legal estate in the lands, subject to the conditions in the mortgage.<sup>2</sup> By Sewall, Ch. J., it was held, that the constructive possession of the mortgagee is important to the security of his title. It has, therefore, he said, been long settled by decisions of the highest authority, that the possession of the mortgagor is the possession of the mortgagee, and that the mortgagor could make no lease, or contract respecting the mortgaged premises, effectually to bind the mortgagee, or prejudicial to his title.<sup>3</sup> Mr. J. Livingston, also, held, that the mortgagor occupies, by the mortgagee's consent, and by a perfect understanding between them, uses the premises as his own.<sup>4</sup>

450. In relation to the point in question there is also the following authority: In November, 1769, Alexander Wyly, then residing in the State of Georgia, executed his bond to Greenwood and Higginson, merchants of London, for the sum of £2,180, conditioned to pay £1,054 on or before the 1st of January, 1773;

<sup>1</sup> Moss v. Gallimore, Doug. 275; 1 T. R. 384.

<sup>2</sup> Gould v. Newman, 6 Mass. 239.

<sup>3</sup> Perkins v. Pitts, 11 Mass. 125. [Benson v. Stewart, 80 Miss. (1 George) 49; Martin v. Jackson, 27 Penn. St. 504.] Neither can the assignee of a mortgagor hold possession adverse to the mortgagee, unless the assignee has taken a conveyance without notice. Newman v. Chapman, 2 Rand. (Va.) 98. But where a *bona fide* purchaser from a mortgagor entered without notice of the mortgage (which was not registered till after the commencement of the ejectment suit), and he, and those claiming under him, had been in the continued possession of the premises under such color of title for more than the time limited by the statute, it was held a sufficient adverse possession to bar the mortgagee, or any claiming under him. Baker v. Evans, 2 N. C. Law, 98. [And the possession, though under an absolute deed, if intended as a mortgage, is not adverse. Babcock v. Wyman, 19 How. (U. S.) 289.]

<sup>4</sup> Jackson v. Loughhead, 2 Johns. (N. Y.) 75. Vide also 2 Cruise, 108; Keech v. Hall, Doug. 21; M'Ketcher v. Hall, 18 Johns. (N. Y.) 289. [Boyd v. Beck, 29 Ala. 708.]



and also executed a deed of mortgage (which was admitted to record in the secretary's office), to secure the payment of the bond. Alexander Wyllly took part with the British in the war of the Revolution, in consequence of which his estate was confiscated, and commissioners were appointed to take possession of it and to sell it. In 1784, the mortgaged premises were sold and conveyed by the commissioners to certain persons in Savannah, who sold and conveyed them to James Houston, who retained peaceable possession of them until his death. In 1796, these lands were sold under execution by the marshal to satisfy a judgment obtained against the executor of Houston, and the purchaser at the sale had notice of the mortgaged deed to Greenwood and Higginson. It was held by Ch. J. Marshall, that the estate of the mortgagor only was confiscated, not that of the mortgagee. And that the possession of the mortgagor was not adverse, and consequently the statute of limitations did not apply.<sup>1</sup>

451. In a case where premises were mortgaged in fee, with a proviso for conveyance, if the principal was not paid on a given day, and, in the mean time, that the mortgagor should continue in possession; upon special verdict it was found, that the principal was not paid on the given day, but that the mortgagor continued in possession. There was no finding by the jury either that interest had or had not been paid by the mortgagor. Under these circumstances, it was held by the Court of King's Bench that the occupation was by permission of the mortgagee; and consequently, that although more than twenty years had elapsed since default in the payment of the money still the mortgagee was not barred by the statute of limitations. It was also held by the court, that an entry by the mortgagee was not necessary to avoid a fine levied by the mortgagor. Abbott, Ch. J., observed: "Upon the finding, I am of opinion, that this must be considered as an occupation by the permission of the mortgagee; and, if so, there was no adverse possession, and the statute of limitations does not apply. The payment of interest would have been conclusive evidence of a continuing tenancy. That fact is not found by the jury; but that is not the only ground upon which the court can proceed. If there were any circumstances from which the jury might have presumed that the premises were not occupied by the permission of

<sup>1</sup> *Higginson v. Mien*, 4 Cranch (U. S.), 415. See also the opinion of Mr. Ch. J. Tilghman in *Galloway v. Ogle*, 2 Binn. (Penn.) 468.

the mortgagee, they ought to have found that fact. Here, however, is nothing to justify us in presuming that this occupation was not by the permission of the mortgagee. The judgment must therefore be for the plaintiff." Mr. Justice Bailey also observed, that the statute of limitations could not attach, unless it be shown that the mortgagor held in opposition to the will of the mortgagee.<sup>1</sup>

452. It has been observed that a mortgagor is sometimes regarded as a tenant at will, and sometimes as a tenant for years, according to the terms of the agreement. The following propositions respecting the relation of the parties to a mortgage, during a possession and perception of the profits by the mortgagor, will be found in Coote's valuable treatise on the law of mortgage.<sup>2</sup> First. That if in the mortgage deed there is a proviso for the enjoyment of the land by the mortgagor and his heir, until default of payment, &c., and the mortgagor is in actual possession, he may, under the agreement, be regarded as tenant for years to the mortgagee during the continuance of the agreement;<sup>3</sup> and on his death, during the agreement, his legal interest may be considered as devolving on his executors, who, during the remainder of the agreement, may be regarded as trustees for the heir of the mortgagor. Secondly. If in the case of such agreement the money is not paid at the appointed time, and the mortgagor continues in possession after the determination of the agreement, without any fresh agreement between the parties, he is, until payment of interest, or other recognition of tenancy, tenant by sufferance, for he came in by rightful title, although he holds over wrongfully. Thirdly. If the mortgage deed contains no such agreement, and the mortgagor remains the actual occupant by consent of mortgagee, he is strictly tenant at will.<sup>4</sup> Fourthly. If, in the latter instance, the mortgage is transferred to another, without the concurrence of the mortgagee,<sup>5</sup> the tenancy at will is determined, and the mortgagor becomes tenant by sufferance to the assignee, until payment of interest, or other recognition of tenancy; and in

<sup>1</sup> Doe v. Surtees, 5 Barn. & Ald. 687. And see Dray v. Marshall, Rice (S. C.), Eq. 378.

<sup>2</sup> See also Metcalf's Dig. 235, and Partridge v. Beere, 5 Barn. & Ald. 604, and the reporter's note to that case.

<sup>3</sup> Powdery v. Blackman, Cro. Jac. 659.

<sup>4</sup> Keech v. Hall, Doug. 22.

<sup>5</sup> Smartle v. Williams, 8 Lev. 387, and 1 Salk. 245; Thunder v. Belcher, 3 East, 449.

all cases, in which he can be considered tenant at will, the death, either of himself, or of the mortgagee, must determine the tenancy. If it is determined by the death of the latter, the mortgagor will be tenant by sufferance to the representative of the mortgagee, until payment of interest, or other recognition of tenancy, and afterwards tenant at will. If it be determined by the death of the mortgagor, and his heir or devisee enter and hold without any recognition of the mortgagee's title, by payment of interest, or other act, an adverse possession may be considered to take place.<sup>1</sup> Fifthly. In every lease in which a tenancy by sufferance exists between the parties, and even where an adverse possession commences, as by the entry of the heir, or devisee of the mortgagor, without the consent of the mortgagee, the payment of interest is a recognition of the title of the mortgagee, and evidence of an agreement that the mortgagor, or person deriving title from him, shall hold at will, and a strict tenancy at will commences.<sup>2</sup> Sixthly. If the land is in the occupation of tenants, and the mortgagor is permitted to receive the rents, he has been considered a receiver for the mortgagee, but, as it seems, without liability to account.<sup>3</sup>

453. Notwithstanding the well-settled general principle, that no length of mortgagor's possession will bar the mortgagee, yet there are authorities of great weight and respectability, which put mortgages on the same footing as bonds; that is, they are presumed to be satisfied at the end of twenty years, if the mortgagor has held possession during the time, and has paid no interest, nor otherwise recognized the claim of the mortgagee. Lord Thurlow, for instance, has said, that he had always understood, when it was clear no interest had been paid for twenty years, a presumption arose that the principal had been discharged.<sup>4</sup> In a much more

<sup>1</sup> Per Holt, in *Smartle v. Williams*, above cited.

<sup>2</sup> *Holland v. Hatton*, Carth. 414.

<sup>3</sup> *Moss v. Gallimore*, Doug. 288; *Ex parte Wilson*, 2 Ves. & Bea. 252; *Gresley v. Addersley*, 1 Swanst. 573.

<sup>4</sup> *Trash v. White*, 3 Bro. C. C. 291. This opinion of Lord Thurlow is, however, contrary to the opinion before expressed in the Court of Chancery in *Leman v. Newnham*, 1 Ves. 51, and *Toplis v. Baker*, 2 Cox, 118. But in neither of these cases was the point in question necessary to be determined. The possession will not be adverse to the mortgagee within the meaning of sec. 15 of 8 and 4 Will. IV. c. 27. Where the land has been in possession of a prior incumbrance, or of a receiver appointed in a suit by the mortgagee against the mortgagor, though at the time, under an unregistered instrument subsequent to the mortgagee, he was only tenant for life. See

modern case in the Court of Chancery in England, when the same point was agitated, though a decision of it was not necessary, Sir Thomas Plummer, Master of the Rolls, thus expresses his views in relation to it: "I cannot accede to the doctrine, that no length of time will operate against a mortgagee who has been out of possession without claim or acknowledgment. The argument of there being a tenancy at will arises from a mere fiction; for there is no actual tenancy, no demise, either express or implied. A mortgagor has not even the rights of a tenant at will; he may be turned out of possession without notice,<sup>1</sup> and is not entitled to the emblements. It is only *quodam modo* a tenancy at will, as Lord Mansfield says, in one of the cases. We cannot push it to that extent, reasoning on the supposed relation of landlord and tenant, which is not founded in fact. The relation of mortgagor and mortgagee is peculiar; in a court of equity the former is considered as owner; and that is the nature of the contract between them; the tacit agreement is, that he is to be the owner if he pays. Then, what is to be the effect of one person's continuing for twenty years in possession of the estate of another, who does nothing to make good his title, and to keep alive the relation of mortgagor and mortgagee? The difficulty I feel is, that if twenty years' possession, without claim on the part of the mortgagee, will not operate as a defence against him, I do not see how any period of time, however long, can bar him. If the fiction of a tenancy at will is an answer to the objection after twenty years, why will it not be an answer after any other time? There would be no possibility of stopping. With respect to the mortgagor, it is clear that his equity is shut out by the mortgagee being in possession for twenty years without acknowledgment; then why should this not be reciprocal? Why should it be necessary for the relation to be kept alive in the one case, and not in the other? For these reasons, though I do not give a positive opinion, I cannot agree to the doctrine intimated in the cases alluded to."<sup>2</sup>

Appendix, pp. xxi. and xxvii. *Wriscon v. Vize*, 2 Con. & Law. (Irish) Ch. 188. And as to adverse possession in respect to mortgagor and mortgagee, under the stat. of 3 and 4 Will. IV., Appendix, as above.

<sup>1</sup> In *Jackson v. Wilsley*, the Supreme Court of New York were inclined to think that a tenant at will is entitled to notice to quit, though it seems to have been previously held in that State that he is not. 9 Johns. (N. Y.) 267.

<sup>2</sup> *Christophers v. Sparke*, 2 Jac. & W. 284. And see also *Cholmondeley v. Clinton*, Ib. 179. [*Palmer v. Eyre*, 6 Eng. L. & Eq. 355.]

454. The above reasoning certainly seems to be founded in just principles, and it also appears that courts of the highest authority in this country have been governed by a similar course of reasoning. In a case in the Supreme Court of the State of New York, a mortgage was given in April, 1775, to J. M., who was afterwards attainted of adhering to the enemy, and an ejectment was brought on the mortgage in the name of the people. On the trial, one ground of defence was, possession for twenty years, under a claim of right and presumption of payment. The chief justice told the jury, that though the people were vested with the rights of the mortgagee, the jury had a right to presume payment from the lapse of time. On a motion for a new trial, the Supreme Court observed, that there was no sufficient evidence to rebut the presumption of payment arising from the lapse of time, as here was no entry by the mortgagee, or those under him, nor demand, nor interest paid for twenty years. The jury, they held, were warranted to presume an extinguishment of the mortgage.<sup>1</sup> And it was subsequently held by Chancellor Kent, to be a point which was settled beyond dispute, that a mortgage is no evidence of a subsisting title, if the mortgagee never entered, and there has been no interest paid for twenty years.<sup>2</sup> So, in the Supreme Court of the United States, in the year 1824, it was held by Mr. Justice Washington, who gave the opinion of the court, "that, where the mortgagor has been permitted to retain possession, the mortgage will, after a length of time, be presumed to have been discharged by payment of the money or a release; unless circumstances can be shown, sufficiently strong to repel the presumption, as payment of interest, a promise to pay, an acknowledgment by the mortgagor that the mortgage is still existing, and the like."<sup>3</sup>

<sup>1</sup> Jackson v. Wood, 12 Johns. (N. Y.) 242.

<sup>2</sup> Giles v. Baremore, 5 Johns. (N. Y.) 545. And see Waterman v. Haskins, Ib. 288; Jackson v. Myers, 3 Ib. 888.

<sup>3</sup> Hughes v. Edwards, 9 Wheat. (U. S.) 497. A mortgagor, remaining in possession after the mortgage is forfeited, and selling to another who has no notice, and who, together with his alienees, continues in possession for the time prescribed by the statute, amounts to a title in North Carolina. Baker v. Evans, 2 Car. L. R. 614. [Bacon v. McIntire, 8 Met. (Mass.) 87; Martin v. Bowker, 19 Vt. 528; McDonald v. Sims, 8 Kelly (Ga.), 850; Field v. Wilson, 6 B. Mon. (Ky.) 479; Newcomb v. St. Peters Ch. 2 Sandf. (N. Y.) Ch. 686; McNair v. Lot, 84 Mo. 285; Nevitt v. Bacon, 82 Miss. (8 George) 212. In Wilkinson v. Flower, 37 Miss. (8 George) 539, it is intimated that the possession of the mortgagor after condition broken is *prima facie* adverse to the mortgagee.]

455. The above authorities (and it seems with great propriety) are in favor of reducing the case of debts secured by mortgage to the condition of other stale and long-neglected demands, and they thus tend to preserve the harmony and consistency of the law in relation to the effect which is produced by lapse of time. And while they do not deny that the relation of tenant at will subsists for some purposes between a mortgagor in possession and the mortgagee, yet they do not allow it to include all the incidents of that relation. As Sir Thomas Plummer observed, "the tenancy at will arises from a mere fiction." And no one can read the above argument of this learned judge, without being convinced that there is no more reason for barring the mortgagor of his right of redemption, by analogy to the statute, than there is for favoring a presumption that a mortgage debt has been paid, if the mortgagor has for twenty years been in quiet possession, and has at no time recognized any interest in the mortgagee.<sup>1</sup>

456. It has been stated, that, upon the execution of a mortgage deed, the mortgagee becomes seised of the legal estate, and may enter into possession, unless prevented by the express terms of the contract. But, in equity, the lands mortgaged are considered as a pledge only in his hands for securing the repayment of the money borrowed. And as long as the right of redemption exists, the mortgagee is considered merely as a trustee for the mortgagor; so that none of his charges or incumbrances attach on the estate. The right of redemption in equity, like the right of entry at law, may be effectually barred by a possession of twenty years. And it is a well-settled rule, that, if the mortgagee is in possession for twenty years, the mortgagor cannot redeem, unless he can bring himself within the proviso hereafter to be considered, which saves the rights of infants, feme coverts, &c.<sup>2</sup> To this general rule

<sup>1</sup> To repel the presumption of satisfaction, it seems that any circumstance evincing the improbability of a discharge will be sufficient. Thus Sir W. Fortescue considered the presumption of payment to be sufficiently answered, by showing that the mortgage debt belonged to the mother of the owner of the estate incumbered, and that she had not permitted the title-deeds to be delivered to him. Her intention, he argued, was therefore manifested, "not to demand payment during her son's lifetime; and yet not to part with her whole right, but to keep it in her own power." *Leman v. Newnham*, 1 Ves. 51. And see *Trash v. White*, 3 Bro. C. C. 289; *Meade v. Bandon*, 2 Dow, 268; *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152.

<sup>2</sup> *Moore v. Cable*, 1 Johns. (N. Y.) Ch. 385; *Demarest v. Wyncoop*, 3 Ib. 129, and the cases there cited; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Lamar v. Jones, &c.*, 3 Har. & M'Hen. (Md.) 828. A mortgagee will not be permitted in a court of



there are, however, the following exceptions, which next require attention.

457. *Where an account has been settled.* As the difficulty of accounting is the principal reason that courts of equity will not allow a mortgage to be redeemed, after the mortgagee has been twenty years in possession, when that objection is removed, by an account having been settled, within twenty years, the right of redemption will be thereby preserved. Thus, in a bill to redeem a mortgage, in 1642: The mortgagee, it appeared, entered in 1650. There were three descents on the defendant's part, and four on the part of the plaintiff; yet the length of time being answered, for the greatest part, by infancy or coverture, and forasmuch as, in 1686, a bill was brought by the mortgagor to foreclose, and an account then made up by the mortgagee, the court decreed a redemption, and an account, from the foot of account, in 1686.<sup>1</sup> So a mortgage, after forty years' possession in the mortgagee, was held to be redeemable, upon the foot of a stated account, with an agreement for turning interest into principal; and the decree was affirmed by the House of Lords.<sup>2</sup>

458. The next exception is, *where the mortgage has been admitted.* Any act of the mortgagee, by which he acknowledges the transaction to be still a mortgage, within twenty years from the time when a bill is brought to redeem, will preserve the right of redemption; as if the mortgagee, by his will, disposes of the money, in case the mortgage is redeemed.<sup>3</sup> It was said by Lord Thurlow, that a man taking notice by a will, or other deliberate act, that he is a mortgagee, will take the case out of the rule, that a mortgagor shall not redeem after twenty years.<sup>4</sup> And an incidental notice, in any conveyance or settlement, is an act which

equity to set up an adverse possession to bar the right to redeem of his mortgagor, or of purchasers under him, unless the possession has been for twenty years, which constitutes an equitable bar by lapse of time. *Gordon v. Hobart*, 2 Sumn. (Cir. Co.) 401; *Slee v. Manhattan Company*, 1 Paige (N. Y.), Ch. 48; *Lansing v. Goelet*, 9 Cow. (N. Y.) 846. [*Huntington v. Mather*, 2 Barb. (N. Y.) S. C. 838; *Freeman v. Baldwin*, 18 Ala. 246; *Phillips v. Sinclair*, 20 Me. 269.]

<sup>1</sup> *Proctor v. Cowper*, 2 Vern. 877.

<sup>2</sup> *Conway v. Skrimpton*, 5 Bro. Parl. Cas. 187. See also *Giles v. Baremore*, 5 John. (N. Y.) Ch. 545; *Cholmondeley v. Clinton*, 2 Jac. & W. 188.

<sup>3</sup> 2 Cruise's Dig. 156.

<sup>4</sup> *Perry v. Marston*, 2 Bro. 897; *Whiting v. White*, 2 Cox, 290; *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594; *Ross v. Norville*, 1 Wash. (Cir. Co.) 18.



supposes deliberation.<sup>1</sup> The fact of a bill of foreclosure having been brought, or of an agreement for the purchase of the equity of redemption, is also regarded as a plain concession, that the mortgagee's interest is liable to be redeemed.<sup>2</sup> So, if the mortgagee acknowledges by letter, either directly or impliedly, that his interest in the property is not absolute, but merely temporary, and as a security for the repayment of the loan.<sup>3</sup>

459. One question, which was argued in a case before Mr. Justice Story, was, whether any naked, verbal admissions of *parol* acknowledgments in conversations, are sufficient to establish the fact, that the mortgagee has treated the conveyance as a mortgage within twenty years. Such admissions and acknowledgments, the learned judge observed, are certainly open to the strong objection, that they are easily fabricated, and difficult, if not impossible, to be disproved, in many cases ; and that they have a direct tendency to shake the security of all titles under mortgages, even after a very long exclusive possession by the mortgagee.<sup>4</sup> He then refers to *Whiting v. White*,<sup>5</sup> in which Lord Alvanley reprobated the introduction of any such *parol* evidence ; and, commenting on the case

<sup>1</sup> *Price v. Copner*, 1 Sim. & Stu. 847 ; *Ord v. Smith*, Sel. Ch. Ca. 9 ; *Hansard v. Hardy*, 18 Ves. 455. In the case of *Pender v. Jones*, 2 Hay. (N. C.) 294, Taylor, J., said : " I am of opinion that a deliberate avowal, on the part of the possessor, of title in the claimant, or a serious assent to the validity of his title, will render an entry or claim unnecessary, and is equivalent in its effects to an entry or claim."

<sup>2</sup> *Ord v. Smith*, *ut supra* ; *Conway v. Skrimpton*, 5 Bro. P. C. 187.

<sup>3</sup> *Hodle v. Healy*, 1 Ves. & Beam. 586 ; *Vernon v. Bethell*, 2 Eden, 110. See also *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152. A mortgagee in possession of lands, having received from the grandfather of the infant heir of the mortgagor a letter, the contents of which were as follows : " Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you ; which I am very willing to settle, if your granddaughter is of age. I never told you any otherways ; as I am informed, she is heiress of what there is. The difference is not worth much. I shall hear from your granddaughter about the business ;" — it was held, that the last-mentioned letter was an acknowledgment of the heiress's right to redeem the mortgage, and that, when she became of age, she was entitled to consider her grandfather as having acted as her agent ; and, consequently, that she was entitled to redeem the mortgage at any time within twenty years after the letter was written. *Trulock v. Roby*, 12 Scott, as so cited in Digest of Eng. Cases in 5 Amer. Law Mag. 180. [A mortgagee had possession sixteen years, and then assigned the mortgage and estate. The deed conveying it to the assignee recited the original mortgage in the usual manner, and it was held, that this assignment was not a sufficient acknowledgment in writing to take the case out of the statute. *Lucas v. Dennison*, 7 Jur. 1122.]

<sup>4</sup> *Dexter v. Arnold*, 8 Sumn. (Cir. Co.) 160.

<sup>5</sup> *Whiting v. White*, 2 Cox, 290.

of *Perry v. Marston*.<sup>1</sup> — where it has been supposed (though it is not, perhaps, certain) that Lord Thurlow thought parol evidence admissible, and sufficient to give the plaintiff a decree for redemption, but he, in fact, decided against it on another ground, — Lord Alvanley said: “I cannot help thinking that it would have been a very wise rule, if no parol evidence had been admitted on these subjects. It is clear, that the party obtains an irredeemable interest by twenty years’ possession; and then that interest is to be totally changed by this sort of loose conversation.” He afterwards added: “I will not take upon myself in the present case to lay down any rule that shall contradict that authority, because it is not necessary. But, at any rate, I think the declarations must be clear and unequivocal; and, in the present case, I do not think that the evidence is of that clear and unequivocal nature as to justify the court in giving the plaintiff a redemption.” The same point, adds Mr. Justice Story, came before the Vice-Chancellor (Sir Thomas Plummer), in *Reeks v. Postlethwaite*; <sup>2</sup> and he, after admitting that there was no case in point, upon principle, decided that parol evidence was so admissible. But, after sifting the evidence in the case (which sufficiently shows the danger of such evidence), he decided that it was not satisfactory, and refused the redemption. Mr. Justice Story then observes: “Then came the case of *Barron v. Martin*,<sup>3</sup> where Sir William Grant thought the parol evidence admissible; but, at the same time, on account of its being unsatisfactory, decided against the redemption, and adhered to the rule laid down by Lord Alvanley, that it ought to be clear and unequivocal to justify a redemption. But there is an important remark made by this eminent judge, in the same case, which is worthy of special notice. ‘It is now decided,’ said he, ‘that twenty years’ possession by a mortgagee will, *prima facie*, bar a right of redemption; and it lies on the mortgagor to show, that such length of possession ought not to produce that effect.’ He added: ‘The *onus* lies on the mortgagor to show that fact, in order to defeat the effect of the possession.’ In *Marks v. Pell*,<sup>4</sup> the same point came before Mr. Chancellor Kent; and the only evidence relied upon, in favor of the redemption, was certain naked, unas-

<sup>1</sup> *Perry v. Marston*, 2 Bro. Ch. 397.

<sup>2</sup> *Reeks v. Postlethwaite*, Coop. Eq. 160.

<sup>3</sup> *Barron v. Martin*, Coop. Eq. 189; s. c. 19 Ves. 828.

<sup>4</sup> *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594.

sisted confessions of the mortgagee, stated by witnesses. The learned judge decided, upon a review of the evidence, that the redemption ought not, under all the circumstances, to be allowed; for 'it would be setting up a dangerous precedent, to give effect to a stale claim, upon such uncorroborated and loose confessions.' In delivering his opinion, he said: 'It was once observed, in the Supreme Court,<sup>1</sup> that acknowledgments of the party, as to title to real property, are a dangerous species of evidence; and, though good to support a tenancy, or to satisfy doubts in cases of possession, they ought not to be received as evidence of title, as it would counteract the beneficial purposes of the statute of frauds. That doctrine strikes me as just and sound; and principles are essentially the same in both courts.' From this language, I cannot but infer, that the learned Chancellor was against the admissibility of the evidence, though he did not deem it necessary to decide the case on that point. His very able reporter (Mr. Johnson) has supposed differently, in his marginal note of the case; but I have been unable so to read the case. I have not, in my researches, found any other cases upon the point. And, what is very remarkable, there is no instance of a decree being made upon such parol evidence in favor of the party seeking to redeem. In the present case, I am spared the necessity of deciding the general principle; for, admitting that parol evidence is admissible (which I am by no means prepared to decide, and I wish to reserve for further consideration), I am of opinion that the parol evidence of the confessions and conversations of the mortgagee, testified to by the witnesses, is wholly unsatisfactory, too loose, and too equivocal, and too infirm in its reach and bearing and circumstances, to justify any decree in favor of a redemption." By the statute of 3 and 4 Will. IV. c. 27, it is enacted, that a mortgagor shall be barred by twenty years' possession of the mortgagee, unless there be an acknowledgment *in writing*; and the statute runs in general from the day when default is made. By the 7 Will. IV., and 1 Vict. c. 28, reciting that doubts had arisen upon the subject, *part payment* of principal or interest is made equivalent to an acknowledgment in writing so as to bar the statute.<sup>2</sup>

<sup>1</sup> 6 Johns. (N. Y.) 21.

<sup>2</sup> See Appendix, pp. xx. xxi. A mortgagee in possession for six years, without acknowledgment of mortgagor's title, purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer: held

460. It is settled in this country by the highest authority, that a purchaser of mortgaged premises, who, at the time of his purchase, had actual notice of the mortgage, or constructive notice thereof by means of the registry, is bound by a previous sufficient acknowledgment of the person under whom he claims, of the existence of the indebtedness, within twenty years.<sup>1</sup>

461. Another exception is, where no time is appointed for payment. Where no particular time is appointed for the payment of mortgage money, as in the case of Welsh mortgages, a redemption will be decreed at any time. Thus, on a bill to redeem a mortgage, the defendant demurred, because the mortgage was sixty years old; but the demurrer was overruled, it appearing to have been agreed, that the mortgagee should enter and hold till he was satisfied, which was in nature of a Welsh mortgage, and in such a case length of time was no objection.<sup>2</sup> This perpetual right of redemption is, however, subject to, and may be lost by, a subsequent agreement.<sup>3</sup> But in case of a mere conveyance to a person, till he is paid his principal and interest, by perception of the rents and profits, no length of time will bar the redemption. Lord Hardwicke held, that in such a case, there was nothing for the statute of limitations to operate upon, as there was no forfeiture, and the mortgagee took the estate subject to a perpetual account. But if, after an account was taken, it should appear that the mortgagee had continued in possession ever since, the statute would run.

462. Where the mortgagor continues in possession, is a still further exception. If the mortgagor continues in possession, no length of time will bar the equity of redemption; and even a possession of one part of the mortgaged premises will keep alive the right to redeem.<sup>4</sup> A person in 1687 mortgaged a set of chambers,

that such possession was not adverse during the existence of the life-estate so purchased, and that the statute of 8 and 4 Will. IV. c. 27, § 28, was not, therefore, a bar to any suit for redemption by the remainder-man or reversioner. *Hyde v. Dallaway*, 2 Hare, 528, cited in *Digest of Eng. Eq. Cases*, in 8 *American Law Mag.* 482.

<sup>1</sup> *Heyer v. Pruyn*, 7 Paige (N. Y.), Ch. 465; *Hughes v. Edwards*, 9 Wheat. (U. S.) 490.

<sup>2</sup> *Ord v. Henning*, 1 Vt. 418. And see *Fenwick v. Reed*, 1 Merivale, 114.

<sup>3</sup> *Hartpole v. Walsh*, 5 Bro. Parl. Ca. 267.

<sup>4</sup> 2 Cruise, 161; *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594. [As against the right to redeem a conveyance absolute in its terms, but in fact a mortgage, the statute does not begin to run till tender of the money secured by the mortgage, and refusal to reconvey. *Wilson v. Richards*, 1 Neb. 842.]

in Gray's Inn, in the city of London, and retained the possession till 1700, at which time a possession of part was delivered to the mortgagee, the mortgagor holding the remainder till 1708, leaving the plaintiff an infant. A bill was brought to redeem in 1726. A redemption was decreed, and it was said by Lord King, that nothing was more clear, than that, if the mortgagor was in possession of any part, he should be admitted to redeem the whole, as being in possession thereof.<sup>1</sup> This, it will be observed, is in conformity to the rule before laid down, that the possession of part of an estate is a possession of the whole.

463. Again, where there is fraud in the mortgagee. Where any species of fraud has been practised by a mortgagee, at the time when the mortgage was made, a court of equity will interfere and give relief, notwithstanding a possession of twenty years.<sup>2</sup> Thus in the before-mentioned case of *Ord v. Smith*, it was expressed that the redemption should be with the mortgagor's own money; and the Master of the Rolls said, that the words in the defeasance, however fettered, signified nothing, where the money was to be repaid; for the borrower being necessitated, and so under the lender's power, the law made a benign construction in his favor. But this, he held, was a fraud in its creation, and in such a case was redeemable after any length of time.

464. As persons claiming in remainder or reversion are not barred by the statute, until after the expiration of the time limited, from the time of such remainder or reversion falling into possession, it has been urged (on the common principle of equity following the law); that the same rule should be applied to successive limitations of an equity of redemption.<sup>3</sup> But, it seems, that the contrary is the settled law on the subject. In a case before Sir William Grant, where the party claiming was entitled in remainder immediately after an estate for life, during the existence of which the mortgagee had entered, it was adjudged, that there could be no redemption after twenty years, in whatsoever way the estate might have been settled.<sup>4</sup> The ground of this rule is the mischief to be apprehended from an unlimited power to redeem generally, and also that the previous right of the mortgagee, might designedly

<sup>1</sup> *Rakestraw v. Brewer*, Sel. Ca. in Cha. 55; *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 594.

<sup>2</sup> 2 Cruise, 161; *Marks v. Pell*, 1 Johns. (N. Y.) Ch. 595; *Reigal v. Wood*, Ib. 402.

<sup>3</sup> *Blake v. Foster*, 2 Ball & Beat. 565, 575, *et seq.*

<sup>4</sup> *Harrison v. Hollins*, 1 Sim. & Stu. 471.

be defeated merely by making a settlement of the property. Another ground is, that, although a remainder-man or reversioner of a legal estate cannot bring his *formedon* until the remainder falls into possession, yet a remainder-man or reversioner of an equity of redemption has a present right to redeem.

465. It is worthy of notice that, prior to the above determination of Sir William Grant, it had been adjudged that the existence of an estate by the curtesy was insufficient to prevent the presumptive bar of the remainder-man's right to redeem, arising from long possession. On the occasion alluded to, Lord Hardwicke remarked, that there would be no bounds to redemption if the excuse of a curtesy estate should prevail; that mortgagees would never be quieted in their possession; that it was of no consequence to them, to whom the right of redemption belonged; and that if the persons entitled did not make use of their right, it was only fitting they should be barred.<sup>1</sup> And it was also held by Chief Baron Eyre, that the plaintiff might redeem, notwithstanding the tenancy by the curtesy, and that therefore his neglect shall bar him.<sup>2</sup> But if the mortgagee's possession be attributable to a title under the husband, independently of that as mortgagee, his enjoyment during the husband's lifetime, however long, will not prejudice the right of the heir. As if the mortgagee becomes the party as well to pay as to receive the interest of the mortgage debt.<sup>3</sup> And under these circumstances the right to redeem does not terminate until the end of twenty years from the time of the husband's death.<sup>4</sup>

466. It has been said that the mortgagee is a trustee to the mortgagor. But it is only in a secondary point of view, and under certain circumstances, and for a particular purpose, that the character of trustee constructively belongs to a mortgagee. There is certainly no trust expressed in the contract. It is only raised, therefore, by implication, and in subordination to the main purposes of the contract. The relation of the parties is a peculiar one, and perfectly *sui generis*. Under certain conditions the mortgagee becomes the purchaser of a security and pledge, to hold for his own use and benefit. He has acquired a distinct and independent beneficial interest in the estate; and, although his right is qualified and limited, it may eventually become absolute and per-

<sup>1</sup> Anon. 2 Atk. 833.

<sup>2</sup> Corbett v. Barker, 1 Anst. 188.

<sup>3</sup> Same case, 8 Anst. 765.

<sup>4</sup> Price v. Copner, 1 Sim. & Stu. 847.



manent, and may be enforced by suit against the mortgagor. It is a general rule, that a trustee is not allowed to deprive his *cestui que trust* of the possession, but a court of equity never interferes to prevent the mortgagee from assuming the possession. In this respect, it will be perceived, that there is a marked difference in the contract between mortgagor and mortgagee, and trustee and *cestui que trust*. A trustee is stopped in equity from dispossessing his *cestui que trust*, because such dispossession would be a breach of trust. A mortgagee cannot be stopped, because in him it is no breach of trust, but in conformity to his contract. On the same principle a mortgagee is not prevented, but assisted in equity, when he has recourse to a proceeding which is not only to obtain the possession, but the absolute title to the estate, by foreclosure. There is no resemblance, in this respect, to the character of a trustee, but to a character directly opposite ; and it is in this opposite character that the mortgagee accounts for the rents and profits when in possession, and when he is not, receives the interest of his mortgage debt. The ground, therefore, on which a mortgagee is in any case and for any purpose considered to have a character resembling that of a trustee, is the partial and limited right, which, in equity, he is allowed to have in the whole estate, legal and equitable. And hence, although as a general rule the statute will not apply to a direct trust, yet a mortgagee is allowed to set up lapse of time as a bar to the equity of redemption.<sup>1</sup>

467. Where the legal estate is barred, the equitable estate is also barred. In a case, which has been treated in this country as one of the highest consequence,<sup>2</sup> an estate subject to a mortgage in fee, was in settlement with an ultimate limitation to the right heirs of S. R. A, on the expiration of the previous estate, entered claiming to be entitled under the limitation ; and he, and after his death, his son, continued in quiet possession, paying interest on the mortgage, for twenty years. It was first determined by Sir W. Grant, Master of the Rolls, that the lapse of time was no bar. But afterwards, when the case came before his successor, Sir T. Plummer, the latter delivered a most learned and elaborate judgment,<sup>3</sup> tending to show, that wherever, in a claim to a legal estate, the remedy is barred in a court of law, by length of time, the

<sup>1</sup> Cholmondeley v. Clinton, 2 Jac. & Walk. 1.

<sup>2</sup> Cholmondeley v. Clinton, 2 Jac. & Walk. 1, as reported, also, in 2 Meriv. 173.

<sup>3</sup> Cholmondeley v. Clinton, 2 Jac. & Walk. 1.



remedy for an equitable estate, will be equally barred, by the lapse of the same period of time, in a court of equity. An appeal was taken to the House of Lords, and, in moving the judgment of the House, Lord Eldon adverted to the general principles adopted by courts of equity on the subject of length of time, and observed on "the vast difference between trusts, some being express, some implied; some relations formed between individuals, in the matter in which they deal with each other, and in which it could hardly be said, that one was trustee, and the other *cestui que trust*, and yet it could not be well denied, that for some purposes they were so. Of this kind, he took the relation between mortgagor and mortgagee to be. He concluded by stating his opinion to be, that adverse possession of an equity of redemption for twenty years was a bar to another person claiming the same equity of redemption, and worked the same effect as disseisin, abatement, or intrusion, with respect to legal estates." Lord Redesdale concurred, and the decree was affirmed.<sup>1</sup> This decree received the approbation of the Supreme Court of the United States, in *Elmendorf v. Taylor*,<sup>2</sup> which was a bill in equity, on appeal from the Circuit Court in Kentucky. Ch. J. Marshall thought, that the analogy of a bill in equity to actions founded on a right of entry derived some title to consideration from the circumstance that the plaintiff does not sustain his claim on his own seisin, or that of his ancestor, but on an equity not necessarily accompanied by seisin, whereas seisin is an indispensable ingredient in a writ of right. The case, however, he considered, must depend upon precedent; and, if one or the other rule has been positively adopted, it should be respected.

<sup>1</sup> *Cholmondeley v. Clinton*, 2 Jac. & Walk. 189.

<sup>2</sup> *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152. Chancellor Kent said: "It is a well-settled rule, that twenty years' possession by the mortgagee, without account or acknowledgment of any subsisting mortgage, is a bar to a redemption, unless the mortgagor can bring himself within the proviso of the statute of limitations." 3 Johns. (N. Y.) Ch. 129. [And where an absolute deed is given as security for a debt, when the right of action to recover the debt ceases, the right to redeem the premises will also cease. *Espinosa v. Gregory*, 40 Cal. 58. But see *Williams v. Durst*, 85 Texas, 421. See also *ante*, § 92.]

## CHAPTER XXXV.

## TRUSTEE AND CESTUI QUE TRUST.

468. It has been shown, in a former chapter, in treating of trustees of *personal* property,<sup>1</sup> that the well-established rule, in regard to direct trusts, belonging exclusively to the jurisdiction of a court of equity, is, that so long as the trust subsists, the right of the *cestui que trust* cannot be barred or excluded by the trustee, by virtue of the length of time during which the latter has held possession. It is equally true, that, in cases of trusts of this description, of real estates, the possession of the trustee is the possession of the *cestui que trust*; and that if the trustee remain in possession, though he does not execute the trust, his possession is still that of *cestui que trust*; and that, if the non-performance of the trust be the only circumstance in his favor, such possession will operate nothing as a bar, it being in accordance with the title of the equitable owner.<sup>2</sup> The possession is, in fact, the same as in the case of a lessee for a term, whose possession, although he may

<sup>1</sup> Chap. XVI. § 166.

<sup>2</sup> In addition to the leading authorities upon the subject, cited in the chapter just above referred to, see *Howard v. Aiken*, 8 M'Cord (S. C.), 467; *Armstrong v. Campbell*, 8 Yerg. (Tenn.) 201; *Overstreet v. Bates*, 1 J. J. Marsh. (Ky.) 870; *Thompson v. Blair*, 8 Murph. (N. C.) 588; *Jones v. Persons*, 2 Hawkes (N. C.), 269. [*Martin v. Jackson*, 27 Penn. St. 504.] An administrator in possession of lands, of which his intestate died seised and possessed, cannot acquire a title in his own right thereby, under the statute of limitations. *North's Administrator v. Barnum*, 12 Vt. 205; *Goodhue v. Barnwell*, Rice (S. C.), Eq. 198. A trustee cannot take advantage of the act of limitations against the *cestui que trust*, or of persons claiming under him. *Redwood v. Riddick*, 4 Munf. (Va.) 222; *Wamburzee v. Kennedy*, 4 Desaus. (S. C.) Eq. 479. [The trustees (in fee) intrusted to the *cestui que trust*, as beneficial owner, the management of the estate. The latter, without ever having had actual occupation, let C into possession, who occupied during the life of the *cestui que trust* for more than twenty years. Held that C had acquired a title by adverse possession under 8 and 4 Will. IV. c. 27, although no tenancy at will had been created between the *cestui que trust* and trustee. *Melling v. Leak*, 82 Eng. L. & Eq. 442. And it seems that if a religious society, whose meeting-house is held in trust by their prudential committee for maintaining a particular form of worship, vote to adopt and do openly adopt another form of worship, their possession becomes adverse. *Attorney-General v. Federal Street Church*, 8 Gray (Mass.), 1.]

not pay rent for fifty years, is no bar at law to an ejectment after the expiration of the term, the previous occupancy being, in reality, consistent with the right of the party against whom he seeks to set it up.<sup>1</sup> As a devise of land to executors, to be sold for the payment of debts and legacies, vests in them a *trust fund* for that purpose, the creditors ought to be considered as having such a *lien* upon the estate thereby set apart for the payment of the testator's debts, as gives them the right at any subsequent period, however late,—as long as the trust remains unexecuted in their favor through the neglect of the executor to perform it, by converting the estate into money, and paying the debts,—to proceed against it by execution, and levy the amount of their debts out of it, if sufficient for that purpose. In such case, there is no limit to the *lien* of the debts short of a presumption of payment from lapse of time.<sup>2</sup>

469. But in cases of resulting, implied, and constructive trusts, the rule is otherwise, it being well settled, as a rule of equity, that, where a claim is made after a great length of time against the holders of trusts of this description, the statute of limitations will apply, as likewise presumption from lapse of time.<sup>3</sup> There was a strong case in support of this doctrine, which arose under the statute of limitations of the island of Jamaica, which declared in express terms, “that the act should not be held to extend to a possession held by trustees.” It was adjudged by the Master of the Rolls, that the exception meant only direct or express trusts, between *cestui que trusts* and their trustees (upon which length of possession does not bar, and ought to have no effect), and that it did extend to every equitable question relative to real property.<sup>4</sup> The statute of 3 and 4 Will. IV. c. 27, § 25, enacts, that, in cases of express trusts, the right of the *cestui que trust*, or any person

<sup>1</sup> See *ante*, Chap. XXXIII. ; *Hoveden v. Annesley*, 2 Sch. & Lefr. 688; *Willison v. Watkins*, 8 Peters (U. S.), 48; *Bowman's Devises v. Wather*, 2 McLean (Cir. Co.), 376.

<sup>2</sup> *Alexander v. McMurry*, 8 Watts (Penn.), 504. See also *Steel v. Henry*, 9 Ib. 528, and *ante*, Chap. XVI. § 169, for the distinction between such trusts declared of the real and personal estate. Where land was devised to A. in trust to apply the rents and profits to the support of R. during his life, in an action by the *cestui que trust* against the trustee, to recover the rents and profits, it was held that the statute of limitations did not apply. *Hemenway v. Gates*, 5 Pick. (Mass.) 421.

<sup>3</sup> See authorities cited *ante*, Chap. XVI. § 178, and in particular *Kane v. Bloodgood*, 7 Johns. (N. Y.) Ch. 90. [Hemming v. Zimmerschitte, 4 Texas, 159.]

<sup>4</sup> *Beekford v. Wade*, 17 Ves. 88.

claiming through him, shall be deemed to have first accrued at the time when the land or rent may have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only against such purchaser, or any person claiming through him. The construction of this section has been, that it applies to cases of *direct* trusts only, and does not extend to *implied* trusts.<sup>1</sup>

470. If a party is to be constituted a trustee by a decree of a court of equity founded on fraud, his possession is adverse from the time the circumstances of the fraud were discovered, and the statute will therefore run from that time.<sup>2</sup> In the language of the Supreme Court of the United States: "It is true, that length of time is no bar to a trust clearly established; and in a case where fraud is imputed and proved, length of time ought not, upon the principles of eternal justice, to be admitted to repel relief. On the contrary, it would seem, that length of time, during which the fraud has been successfully concealed and practised, is rather an aggravation of the offence, and calls more loudly upon a court of equity to grant ample and decisive relief.<sup>3</sup> But length of time necessarily obscures all human evidence; *and as it thus removes from the parties all the immediate means to verify the nature of the original transactions*, it operates by way of presumption in favor of innocence, and against the imputation of fraud.<sup>4</sup> Lord Kenyon, upon this principle, refused to permit a fraudulent purchaser of a leasehold estate to be turned into a trustee for the children of the testator, in consequence of the great lapse of time between the

<sup>1</sup> See Appendix, p. xx.

<sup>2</sup> *Hoveden v. Lord Annesley*, 2 Sch. & Lef. 607; *Townsend v. Townsend*, 1 Cox, 28; *Prevost v. Gratz*, 6 Wheat. (U. S.) 481; *Wallace v. Duffield*, 2 Serg. & Rawle (Penn.), 521. [*Michoud v. Girod*, 4 How. (U. S.) 508.]

<sup>3</sup> So general is the condemnation of all fraudulent acts by the common law, that a fraudulent estate is said, in the masculine language of the books, to be no estate in the judgment of the law. It forfeits the protection of every statute which gives confirmation to doubtful titles, and while a disseisor has the benefit of the statute of *finances* and of *limitations* in support of his wrongful title, a title acquired by covin is indefinitely open to be disputed; and even acts, as well *judicial* as others, which of themselves are just and lawful, if infected with fraud, are in judgment of law vicious and unavailing. *Roberts on Fraud*. Conv. 520 (c. 5, § 1).

<sup>4</sup> *Prevost v. Gratz*, per *supra*, Story, J., in delivering the opinion of the court. And see *ante*, Chap. XVIII. Fraud will never be presumed, though it may be proved circumstantially. Now, where an act does not necessarily import fraud, where it has more likely been done through a good than a bad motive, fraud should never be presumed. *Gregg v. Sayre*, 8 Peters (U. S.), 244.

purchase and the filing of the bill.<sup>1</sup> So, where a suit was instituted to disturb a purchaser, and to make him a trustee by construction, on the ground of fraud, it was held, that in cases of possible eventual trusts, depending upon proof, length of possession was and ought to be a bar, upon the principle of the statute of limitations.<sup>2</sup> Even if the grantor in deeds be justly chargeable with fraud, but the grantees did not participate in it; and when they received their deeds, had no knowledge of it, but accepted the same in good faith, the deeds, upon their face, purporting to convey a title in fee, and showing the nature and extent of the premises; there can be no doubt the deeds do give color of title under the statute of limitations.<sup>3</sup>

471. It is indeed perfectly clear, that whenever a person takes possession of property in his own name, and is afterwards, by matter of evidence or by construction of law, changed into a trustee, lapse of time may be pleaded in bar.<sup>4</sup> The following general doctrines, upon the subject, have been advanced by the Supreme Court of the United States, as being well established: "Though time does not bar a direct trust, as between trustee and *cestui que trust*, till it is disavowed, yet where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent, and his purchase would have been repudiated for fraud. So where a party takes possession in his own right, and was *prima facie* the owner, and is turned into a trustee by matter of evidence merely; and where one intending to purchase the entire interest in the land took a conveyance without words of limitation to his heirs, passing only an estate for life, the lapse of fourteen years, after the expiration of the life-estate, was a protection to the heirs of the purchaser.<sup>5</sup> What that reasonable time is, within which a constructive trust can be enforced, depends on the circumstances of the case; but there can be few cases where it can be done, after twenty years' peaceable possession, by the person who claims in his own right, but whose acts have made him trustee by implication. This possession entitles him at least to the same protection as that of a direct trustee, who, to the plaintiff's knowledge, disavows the

<sup>1</sup> *Bonney v. Ridgard*, cited in 17 Ves. 151, and in 2 Bro. C. C. 438.

<sup>2</sup> *Andrew v. Ridgely*, 4 Bro. C. C. 125.

<sup>3</sup> *Gregg v. Sayre*, *supra*.

<sup>4</sup> *Deconche v. Savetier*, 3 Johns. (N. Y.) Ch. 190; *Walker v. Walker*, 16 Serg. & Rawle (Penn.), 170. And see *ante*, Chap. XVI. § 178. [*Taylor v. Dawson*, 3 Jones, Eq. (N. C.) 86.]

<sup>5</sup> *Higginbotham v. Burnet*, 5 Johns. (N. Y.) Ch. 184.

trust, and holds adversely.” “A purchaser in possession, by contract to sell, is in law a trespasser; but in equity he is the owner of the estate, having taken possession under the contract, and the vendor is in the situation of an equitable mortgagor.<sup>1</sup> If the entry was by purchase, and the purchaser claims the land in fee, he is not a trustee; his title, though derivative, is adverse to that of the vendor; he enters and holds for himself. Such was the doctrine of this court in *Blight's Lessee v. Rochester*.<sup>2</sup> In that case the court said, ‘The vendee acquires the property for himself, and his faith is not pledged to maintain the title of the vendor.’” “Equity makes the vendor without deed a trustee to the vendee, for the conveyance of the title; the vendee is a trustee for the payment of the purchase-money, and the performance of the terms of the purchase. But the vendee is in no sense the trustee of the vendor, as to the possession of the property sold; the vendee claims and holds it in his own right, for his own benefit, subject to no right of the vendor, save the terms which the contract imposes; his possession is, therefore, adverse as to the property, but friendly as to the performance of the conditions of the purchase.”<sup>3</sup>

<sup>1</sup> 15 Ves. 138.

<sup>2</sup> *Blight's Lessee v. Rochester*, 4 Peters (U. S.), 506.

<sup>3</sup> *Boone v. Chiles*, 10 Peters (U. S.), 222, 223, 225. And see *Willison v. Watkins*, *Ib.* 43; *Hughes v. Edwards*, 9 Wheat. (U. S.) 490. [But a court of equity will not hold a possession obtained by fraud, to be adverse to the advantage of the perpetrators of the fraud. *West v. Rodahan*, 46 Ga. 553.] The rule that trust and fraud are not within the statute of limitations is subject to this modification, that the possession of the trustee is the possession of the *cestui que trust*, and no length of such possession will bar; but if a trust be constituted by the fraud of one of the parties, or arises from a decree of a court of equity, the possession of the trustee becomes adverse, and the statute will run from the time the fraud was discovered. *Van Rhyn v. Vincent's Ex'rs*, 1 M'Cord (S. C.), Ch, 314; *Thompson v. Blair*, 8 Murph. (N. C.) 583. The distinction which has been taken between the replication of fraud in a court of law, and in a court of equity, viz. that in the one tribunal the statute runs from the commission of the fraud, and in the other from its discovery, or the means afforded of its discovery, has been fully considered, *ante*, Chap. XVIII. § 188. We offer, in addition to the authorities there cited, that of Swift, J., in Connecticut, who says: “It is unnecessary to consider the question whether fraud will take the case out of the statute; for I apprehend, on a sound construction, it will be found not to be embraced by the words, nor comprehended within the meaning of the statute; and it would be a new idea to construe a statute liberally for the protection of fraud.” *Beach v. Catlin*, 4 Day (Conn.), 294. The only two specific cases of *resulting* trusts are, first, where the purchaser has paid the price with his own money, but taken the conveyance in the name of another (not where he has paid with the money of another, and taken the conveyance in his own name), and, secondly, where a trust has been declared of but part of the estate, from which the law implies an intent to reserve the beneficial ownership of the residue. According to *Lloyd v. Spillett*, 2 Atk. 150, and *Gibson*,



472. Even in cases of direct and technical trusts (as has been shown in a former chapter), if the trustee should deny the right of his *cestui que trust*, and assume absolute ownership, the latter could not be allowed a remedy beyond the period limited for the recovery of legal estates at law, — though, as we have seen, so long as the trust is a subsisting one, and admitted by the act or declaration of the parties, the statute cannot affect it.<sup>1</sup> This rule is founded upon the same principle that applies at law to tenants in common, where the statute does not run but from actual ouster; namely, the possession of one is not adverse to the right of the other, but is in support of their common title. When such transactions, therefore, take place between trustee and *cestui que trust*, as would, in the case of tenants in common, amount to an ouster of one of them by the other, a court of equity would consider length of time afterwards as of consequence.<sup>2</sup> Again, in the words of McLean, J.: “There can be no stronger case put to illustrate the doctrine, that the statute does not run against an established and continuing trust, than that of *landlord and tenant*. On general principles, the tenant is not permitted to dispute his landlord’s title. Having entered under that title, he can set up no adversary title to protect his possession. And yet, if he publicly disclaim his landlord’s title, and profess to hold under a hostile title, the statute of limitations will begin to run from the time of such disclaimer.”<sup>3</sup> Though there can be no *disseisin* of a direct trust, yet, where there is a clear adverse possession for more than the time limited, without the acknowledgment of any equity or trust estate in any one, and no circumstances are stated in the bill or shown in evidence, which overcome the decisive influence of such adverse possession, the established doctrine, say our Federal courts, of courts of equity (from its being a rule adopted by those courts, independent of any legislative limitations), is, that they will not entertain so stale demands.<sup>4</sup> So, of course, if a trust be duly sur-

Ch. J., in giving the opinion of the court in *Kisler v. Kisler*, 2 Watts (Penn.), 323, in which are cited a considerable number of authorities. And see *Pipher v. Lodge*, 4 Serg. & Rawle (Penn.), 315.

<sup>1</sup> Chap. XVI. § 174; *Harwood v. Oglander*, 6 Ves. 199; and see 8 Ib. 106. [And see *ante*, § 42, note.]

<sup>2</sup> See *ante*, Chap. XXXII., and *Willison v. Watkins*, 3 Peters (U. S.), 48.

<sup>3</sup> *Bowman’s Devisees v. Wather*, 2 McLean (Cir. Co.), 876. And see *ante*, Chap. XXXIII. [Taylor v. Benham, 5 How. (U. S.) 238.]

<sup>4</sup> *Baker v. Whiting*, 3 Sumn. (Cir. Co.) 476; *Piatt v. Vattier*, 9 Peters (U. S.), 405.



rendered, the subsequent possession of one deriving title from the trustee, but who has claimed adversely to the *cestui que trust*, will be protected by the statute.<sup>1</sup>

473. It has been attempted to extend the rule, that the possession of the trustee is the possession of the *cestui que trust*, to all cases where, during the existence of an outstanding legal estate in a trustee, the beneficial enjoyment, for some considerable time, has been had by a stranger. To sustain this attempt, the following reasoning has been offered; that so long as the interest of the trustee is admitted to subsist, there can be no disseisin of the *cestui que trust*; that the trustee holds, and can only hold, for the benefit of the rightful owner; that he cannot divest himself of the character of trustee, and no stranger can discharge or deprive him of it.<sup>2</sup> But, to this reasoning, it has been replied, that, although a *disseisin*, according to the strict meaning of the term, cannot be applied to the interest of a *cestui que trust*, yet that the possession of a stranger will virtually amount to a disseisin, and is no less adverse to the right of the beneficial owner, than if the latter was invested with the legal estate; and that, if the rule which prevents the application of the statute of limitations, as between *cestui que trust* and trustee, hold between *cestui que trust* and a stranger, it would nearly annihilate the force and utility of the statute, since the practice of vesting landed property in trustees is so prevailing and general. After much seeming contrariety of opinion on this subject, it appears to be now settled, that, if an equitable title be not enforced within the same time that would bar a legal title under corresponding circumstances, courts of equity, regulating the aid they afford by analogy to the act of limitations, will not relieve; and that the trust of the legal estate does not govern, but follows, the equitable title.<sup>3</sup> Sir Thomas Plummer, Master of the

<sup>1</sup> *Guphill v. Isbell*, 1 Bail. (S. C.) 280. Whenever the legal title is in one person, and the real interest in another, they form but one title, and the statute of limitations does not run between the holders of such title, until the trustee disclaims and acts adversely to the *cestui que trust*. *Rush v. Barr*, 1 Watts (Penn.), 110. See also *Lyon v. Marclay*, Ib. 271.

<sup>2</sup> *Cholmondeley v. Clinton*, 2 Meriv. 357, 358, 359. [If the legal estate be in a trustee, the statute will run against him. And when he is barred, so is the *cestui que trust*, though the latter may have been under disability. *Coleman v. Walker*, 3 Met. (Ky.)

<sup>3</sup> *Llevellyn v. Mackworth*, Barn. Ch. 445, 449; *Bond v. Hopkins*, 1 Sch. & Lefr. 429; *Medlicott v. O'Donnell*, 1 Ball & Beat. 156. A purchaser from one of several trustees for A for life, remainder in trust to sell to B, entered under his deed. Held

Rolls, considered that every instance, in which an outstanding legal estate in the trustee of an old term had been allowed to operate as a protection to a puisne equitable title against a prior one, was a precedent against the doctrine, that there exists an indissoluble connection between the legal estate and the equitable, to which it was first attached ; and he held expressly that the mere existence of the legal estate could not excuse the laches and non-claim of the rightful owner of the equitable estate, if there had been a possession for twenty years unequivocally adverse.<sup>1</sup> And it is on this very principle that the before-mentioned rule has been established with regard to a mortgage ; namely, that an exclusive possession of an equity of redemption, during the time limited for the right of entry at law, will operate as a bar to all adverse claimants, and produce the same effect as disseisin with regard to legal interests.

474. The possession of *cestui que trust* is not adverse to the title of the trustee. Thus, where the rents, issues, and profits of a trust estate (though for above twenty years after the creation of the trust estate), without any interference of the trustees, was consistent with, and secured to, the *cestui que trust*, by the terms of the trust deed, such possession was held not to be adverse to the title of the trustees, so as to bar their ejectment against his grantee, brought after twenty years.<sup>2</sup> The *bona fide* possessor of the legal title is not affected by a secret trust of which he has not direct and positive notice ; and the possession of *cestui que trust*, and exercise by him of every act of ownership, is not such notice. But the possession of the *cestui que trust* becomes adverse, when the legal title is conveyed in violation of the trust.<sup>3</sup> And it has been held, that, after a lapse of *thirty-two* years, a release to a *cestui que trust* will be presumed against the heirs at law of a trustee.<sup>4</sup>

475. It is a maxim, that no conveyance by *cestui que trust* can

that the statute commenced running at the time of the entry, against the whole of the estate, and that twenty-one years' adverse possession barred, as well the trustee as the *cestui que trust* for life, and those in remainder. *Smilie v. Biffle*, 2 Barr (Penn.), 152.]

<sup>1</sup> *Cholmondeley v. Clinton*, 2 Jac. & Walk. 158, which is cited as sound authority by Mr. Chief Justice Marshall, in *Elmendorf v. Taylor*, 10 Wheat. (U. S.) 152.

<sup>2</sup> *Keene v. Deardon*, 8 East, 248 ; *Earl of Pomfret v. Lord Windsor*, 2 Ves. 472.

<sup>3</sup> *Scott v. Gallagher*, 14 Serg. & Rawle (Penn.), 338.

<sup>4</sup> *Moore v. Jackson*, 4 Wend. (N. Y.) 58.

work a forfeiture of his life-estate.<sup>1</sup> In the case of *Lethieullier v. Tracy*,<sup>2</sup> the Lord Chancellor (Hardwicke) said ; “ I will suppose, for argument’s sake, that Mrs. Tracy had levied a *fine sur concessit* of her estate for life ; yet, as it is a *trust estate*, and there are limitations to trustees to preserve contingent remainders, I am of opinion that it does not work a forfeiture of her estate for life, because it cannot at all hurt or affect the subsequent remainders, as there are trustees under the will to preserve them, and therefore such a fine would, in equity, operate at most as a grant only of such interest as she had a power to grant.” “ A court of equity will never construe such a fine to work a wrong, but it operates only on the trust to preserve the contingent remainders, and not on the legal estate ; for Lord Talbot, in the case of *Hoskins v. Hoskins*, and myself, in a cause that came before me afterwards, were of opinion, that a person so intrusted, levying a fine creates no wrong, but operates so as to grant all the conusor had a power to grant,” &c.

<sup>1</sup> *Smith v. Dennison*, 16 East, 248 ; *Smith v. Wheeler*, 1 Ventris, 129 ; and Hogan’s Ed. of Tillinghast’s *Adams on Eject.* (1846), p. 51 ; *Saunders on Uses*, 201.

<sup>2</sup> 2 Atk. 729.

## CHAPTER XXXVI.

DISABILITIES IN RESPECT TO REAL PROPERTY.<sup>1</sup>

476. It has been shown in a former chapter, that, unless persons are under the disabilities expressly mentioned in the statute, they cannot be exempted from its operation by judicial construction;<sup>2</sup> and so it would seem by the civil law, that prescription runs against all persons, without exception, unless they are included in some exception established by law.<sup>3</sup> It seems to have been a prevailing notion, that the rights of infants, femmes covert, persons *non compos*, in prison, &c., are saved, by the statute 32 Hen. VIII., and it has been stated generally, in a work of high authority,<sup>4</sup> that this statute has the usual savings for persons laboring under the above-mentioned disabilities. It will appear, however, on examination, that the savings only extended to persons who were subject to such disabilities at the time this statute was made.<sup>5</sup> The statute Hen. VIII. is different, in this respect, from the statute of 21 James I.

<sup>1</sup> For the law more in general as to disabilities, the reader will refer back to Chap. XIX.

<sup>2</sup> See *ante*, Chap. XIX. § 194.

<sup>3</sup> Civil Code of Louisiana, p. 703. [A person for whose use a suit is brought is entitled to the benefit of any disability to which he would have been entitled, had the suit been in his own name. *Davis v. Sullivan*, 2 Eng. (Ark.) 449.]

<sup>4</sup> Bacon's Abridgment.

<sup>5</sup> Brook, in his "Reading" upon this statute, gives the following construction to its provisions in favor of the rights of infants, &c.: "A man seised in right of his wife is disseised, or makes a discontin, and liveth sixty-one years, he and his wife die, the heire of the wife shall not have action, claime, nor enter. Because none is aided but those which were covert at the time of the statute, &c., and the haire doth not claime upon the seisin of his ancestor beyond sixty years, and an entry is a claime." Bro. Reading, p. 60. Again: "If tenant for life, or an ideot, or a man imprisoned, or beyond sea, are disseised, and suffer the sixty years to passe, and dyeth, their heire, nor those in the reversion, shall not make claime, nor enter, nor have action; because, if their entries are taken away, they shall be barred *in perpetuum*, for the reason aforesaid." Ibid. 61. Again: "If an infant be seised at fourteen yeares, and hath issue, and dyeth before twenty-one yeares, and every issue one after the other, until sixty yeares are past, their heire shall never have action nor claime; because, an infant, or the like, are not excepted, but only those which were infants *tempore statuti*." Ibid. Again: "An infant sells his land by deed indented, and inrolls the deed within sixe moneths, he being within age, the vendee enters, the infant ousts him, and continueth by sixty yeares, the vendee may re-enter, and retraverse, and, if he be ousted, may have a writ of right."

477. The saving clause in the statute of James, in favor of persons who are under any of the above-named disabilities, is as follows: "That if any person, or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be, or shall be, at the time the said right or title first descended, accrued, come, or fallen within the age of one-and-twenty years, feme covert, *non compos mentis*, imprisoned, or beyond seas, that then such person or persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heir and heirs, shall within ten years after his and their full age, discoverment, coming of sound mind, enlargement out of prison, or coming into this realm, or death, or take benefit of, and sue forth the same, and at no time after the said ten years."<sup>1</sup> As this saving clause only extends to the person on whom the right first descends, when the statute has once begun to run, it will continue to run without being impeded by any subsequent disability.<sup>2</sup> And the principle

<sup>1</sup> The statute of limitations of Pennsylvania fixes the limitation of *twenty-one* years as taking away the right of entry, and provides, that, if any person or persons having such right or title, be, or shall be, at the time such right or title first descended or accrued, within the age of twenty-one years, *femes covert*, &c., then such person or persons, and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, &c., within ten years after full age, &c. The defendant in error was born in 1791, and was twenty-one years of age in 1812. An interest in the property, for which the ejectment was brought, descended to her in 1779. The title of the plaintiff in error commenced on the 13th of April, 1805, under deeds adverse to the title of the defendant in error, and all others holding possession of the property under the same. On the 13th of April, 1826, twenty-one years prescribed for the statute of limitations for a right of entry against her possession expired; and the bar was complete at that time, as more than ten years had run from the time the defendant in error became of full age. The suit was not commenced till May, 1830. *Gregg v. Lessee of Sayre et al.*, 8 Peters (U. S.), 214. In Connecticut the right of the wife in her land is not barred by an adverse possession of *fifteen* years (the time prescribed by the statute of that State), during the coverture, but is saved by the proviso of the statute; and therefore an action of ejectment, in the name of the husband and wife, may be restrained, notwithstanding such adverse possession. *Watson v. Watson*, 10 Conn. 77.

<sup>2</sup> If the plaintiff is not beyond seas at the time when the cause of action accrued, the time of limitation begins to run, so that if he [or if he dies abroad], his representatives do not prosecute within the time, they are barred. *Smith v. Clark*, 1 Wils. 134. So, if after the statute begins to run a woman is married, the coverture does not suspend it. *Currier v. Gale*, 3 Allen (Mass.), 328. [A temporary absence for a special purpose, with the intention of returning, does not interrupt an adverse possession. *Cunningham v. Patton*, 6 Barr (Penn.), 355.]

is the same where a disability, existing at the time of the commencement of the title is afterwards removed and a subsequent disability ensues, the statute continuing to run, notwithstanding the second disability.<sup>1</sup>

<sup>1</sup> That such is the rule, both in personal actions and actions for the recovery of lands, see *ante*, Chap. XIX. § 196; *Doe v. Jones*, 4 T. R. 301; *Jackson v. Cairns*, 2 Johns. (N. Y.) 301; *Same v. Wheat*, 18 Ib. 40; *Bailey v. Jackson*, 6 Ib. 210; *Jackson v. Robbins*, 16 Ib. 169; *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129; *Jackson v. Moore*, 16 Johns. (N. Y.) 513; *Moers v. White*, 6 Johns. (N. Y.) Ch. 372; *Hall v. Vandegrift*, 2 Binn. (Penn.) 374; *Walden v. Heirs of Gratz*, 1 Wheat. (U. S.) 292; *Halsey v. Beach*, 1 Penn. 122; *Peck v. Randall*, 1 Johns. (N. Y.) 165; *Fitzhugh v. Anderson*, 2 Hen. & Mun. (Va.) 289; *Dow v. Warren*, 6 Mass. 828; *Pearce v. House*, 2 Taylor (N. C.), 305; *Richardson v. Whitefield*, 2 M'Cord (S. C.), 148; *Adamson v. Smith*, 2 Const. (S. C.) 269. Under the revised statutes of New York, as formerly, if an adverse possession commence in the lifetime of the ancestor, it will continue to run against the heir, notwithstanding any existing disability on the part of the latter, when the right accrues to him or her. *Fleming et ux. v. Griswold*, 8 Hill (N. Y.), 85; *Baker v. Van Valkenburgh*, 29 Barb. (N. Y.) 319. In North Carolina, where an ancestor brought an ejectment, within a year after his title accrued, and continued to prosecute it, until it abated by his death, at which period his heirs at law were infants, and they brought another ejectment within three years after their arriving at full age, it was held, they were barred. *Pearce v. House*, N. C. Term, 305. It was expressly declared by Chief Justice Hornblower, in giving the opinion of the court in a case in the Supreme Court of New Jersey, that the course of decisions, both in England and in this country, has established the rule *beyond doubt*, that where the statute of limitations has commenced running, it runs over *all* subsequent disabilities, and intermediate acts and events. *DeKay v. Darrah*, 2 Green (N. J.), 294. See also *Carlisle v. Stitler*, 1 Penn. 6; *Rankin v. Tenbrook*, 6 Watts (Penn.), 388; *Thompson v. Smith*, 7 Serg. & Rawle (Penn.), 209. A doctrine fully and absolutely confirmed by the Supreme Court of the United States, in 1843, in *Mercer's Lessee v. Selden*, 1 How. (U. S.) 37. The same has been the established doctrine in Virginia; and in *Parson v. McCracken*, 9 Leigh, 495, Parker, J., gives an opinion strongly to this effect; so also did Tucker, J., who alluded to some law opinions to the contrary. By sec. 16 of the statute of 8 and 4 Will. IV. c. 27, persons under the disability of infancy, lunacy, coverture, or beyond seas, and their representatives, are to be allowed ten years after the removal of their disability or death to enforce their rights. But by sec. 17, even though a person be under a disability when his claim first accrues, he must enforce it within *forty* years, even though the disability continue during the whole of such period; and no further time (by sec. 18) is to be allowed for a succession of disabilities. See Appendix, p. x.; likewise, *Lewis v. Barksdale*, 2 Brockenb. (Cir. Co.) 436. [*McFarland v. Stone*, 17 Vt. 165; and see also *Guion v. Anderson*, 8 Humph. (Tenn.) 298. A devised certain slaves to his daughter's children, and died in 1819. They were sold by her husband to B, in 1821. The daughter died in 1845, and her children brought an action of trover against B, in 1846, to recover the value of the slaves. Held, that, if the assent of the executors of A's will was obtained in 1819, the title of B was good by adverse possession, and if the assent of the executors was not given till 1845, they were barred by B's possession, and that the case was not excepted by the infancy of the plaintiffs, who came of age in 1839, as that exception only availed those who had an original cause of action, which a legatee has not. *Bennett v. Williamson*, 8 Ired. (N. C.) 121.]

478. A distinction was once attempted between voluntary and involuntary disabilities in this respect, and it was maintained that an involuntary disability, as insanity, occurring after the statute had begun to run, would suspend its progress. But Lord Kenyon, Ch. J., said he never heard it before doubted whether, when any of the statutes began to run, a subsequent disability would stop their running. If the disability, he said, would have such an operation on the construction of one of those statutes, it would also on the others. And he was very clearly of opinion, on the words of the statute of fines, on the uniform construction of all the statutes of limitation down to that time, and on the generally received opinion of the profession on the subject, that this question ought not to be disturbed. It would be mischievous, he thought, to refine and make nice distinctions between the cases of voluntary and involuntary disabilities; but in both cases, when the disability is once removed, the time begins to run.<sup>1</sup> So, where it appeared in evidence, that the person under whom the lessors of the plaintiff claimed, and to bar whom a fine was set up, was of sane mind when the fine was levied, but that he became insane about two years afterwards; the question was whether the time continued to run against him while he was in that state. If it did not, the lessors of the plaintiff had made their entry in time. A verdict was taken for the plaintiff, with liberty to the defendant to move to enter a nonsuit in case the court should be of opinion that the party was barred. Erskine was to have shown cause against the rule for entering the nonsuit. But, he said, the current of authorities, on looking into them, was so strong against him, that he would not pretend to argue the question. The court said he was right in giving up the point, for that it was too plain to be disputed.<sup>2</sup>

479. By the construction, then, which has uniformly been given to the meaning and design of statutes of limitation, as they relate to the favor which they usually extend to infants, &c., it seems perfectly well established, that when the statute has once begun to run, successive or (as they are often denominated) *cumulative* disabilities are of no avail. That this construction is the true one

<sup>1</sup> Doe v. Jones, 4 T. R. 801. [Allis v. Moore, 2 Allen (Mass.), 306.]

<sup>2</sup> Doe v. Shane, 4 T. R. 807. And see *ante*, p. 207. That there is no difference between voluntary and involuntary disabilities. Frewell *et ux.* v. Collins, 8 Brev. (S. C.) 286. [The statute begins to run against an insane person, who has conveyed his estate, when he is restored to sanity, and has knowledge of the deed. Dicken v. Johnson, 7 Ga. 484.]



will clearly appear by referring to the policy of such enactments. They are designed solely to preserve the peace of society, by the prevention of litigation respecting dormant titles, and are hence emphatically styled *statutes of repose*.<sup>1</sup> But, according to the opinion of a learned English writer, if the right first accrue to a person who is at that time under a disability, the statute will not begin to run against him till he shall be free from disability; and successive disabilities, without any intermission, will continue, to him, a protection against being barred by non-claim. That is, if the successive disabilities are in the same person, on whom the right first descended, he may enter within the time given by the statute after the removal of the last disability.<sup>2</sup> This equitable construction of the statute was urged by the counsel in the Supreme Court of Massachusetts; but Mr. Chief Justice Parsons would not allow it to prevail, inasmuch as he thought it would defeat the operation of the enacting clause, which relates only to disabilities existing "at the time" the right accrued. In this case, the plaintiff was an infant, and, before the termination of her infancy, the disability of coverture occurred; but the court held, that the latter disability not existing when the right first accrued, the party was bound to have brought her writ within the given time after the first disability ceased.<sup>3</sup> And a similar decision has also been made in Connecticut, in a case where a female heir was under age at the time the title descended to her, and married before she arrived at the age of twenty-one. It was decided she could take advantage of the saving of the statute in favor of infancy only, and that she was not protected during coverture, with a right to bring her action at the end of the time limited after she became discovert.<sup>4</sup> So, also, in a case in the Court of Chancery in the State of New York, where a title accrued to an infant female, who afterwards married, it was held by Chancellor Kent, that she must commence her ejectment within ten years after coming of age, provided twenty years have elapsed since the death of the person last seised.<sup>5</sup> In this case, the

<sup>1</sup> See *ante*, p. 242, note 2; and Ch. I. § 9.

<sup>2</sup> Preston on Abs. of Tit. 340.

<sup>3</sup> *Eager v. Commonwealth*, 4 Mass. 182.

<sup>4</sup> *Bunce v. Wolcott*, 2 Conn. 27. And see opinion of Mr. Justice Smith, in *Bush v. Bradley*, 4 Day (Conn.), 298. See also *Griswold v. Butler*, 3 Conn. 227. [*Dugan v. Gittings*, 3 Gill (S. C.), 188.]

<sup>5</sup> *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 129.

learned Chancellor reviewed the principal English and American decisions on the present subject; and, in an able discussion, to which the reader will do well to refer, he adheres to the doctrine, that cumulative disabilities are not within the policy and settled and sound construction of the statute. The doctrine of any inherent equity creating an exception as to any disability, where the statute creates none, he considered had been long and uniformly exploded. General words, he said, in the statute, must receive a general construction; and that, if there be no express exception, the court could create none.<sup>1</sup>

480. The word *death*, in the before-mentioned saving, refers to the death of the person to whom the right first accrued. It was formerly contended, that the meaning of the statute was, to allow every person at least twenty years after their title accrued, if there was a continuing disability from the death of the ancestor last seised, and ten years more to the heir of the person dying under a disability, which ten years were in addition to the twenty years allowed by the first clause of the statute.<sup>2</sup> But it was justly observed by the court, that if this construction obtained, there was no calculating how far the statute might be carried by parents and children dying under age, or continuing under other disabilities in succession; and that the word *death*, in the second clause, meant and referred to the death of the person to whom the right first accrued, and was probably introduced in order to obviate the difficulty which had arisen in the case of *Stowell v. Zouch*,<sup>3</sup> upon the construction of the statute of fines, from the omission of that word; and that the statute meant that the heir of every person, to which person a right of entry had accrued during any of the disabilities there stated, have ten years from the death of his ancestor, to whom the right first accrued during the period of disability, and who died under such disability, notwithstanding the twenty years from the first accruing of the title to the ancestor should have been expired.

481. As it appears, then, if several disabilities exist *together*<sup>4</sup>

<sup>1</sup> See also *Dupliex v. De Roven*, 2 Vern. 540; *Beckford v. Wade*, 17 Ves. 87; *Hall v. Wybourne*, 2 Salk. 420.

<sup>2</sup> *Doe v. Jesson*, 6 East, 80.

<sup>3</sup> *Stowell v. Zouch*, Plowd. 858.

<sup>4</sup> There can be no dispute, that, if several disabilities exist together in the same person, at the time when the adverse possession commenced, such person will have at least ten years, under the statute of James, to enter, or bring an action, after both disabilities are removed. *Ante*, Ch. XIX. § 198. One disability, coeval with the de-

in the owner of an estate, as infancy and insanity, when the adverse possession commences against him, he, or, if he dies, his heirs, have at least ten years within which to enter or bring an action, after both disabilities are removed; and that they are entitled to full twenty years for this purpose, from the time at which the adverse possession began. Thus, if the disabilities should be removed within three years after the adverse possession commenced, they would not be barred under seventeen years. So, if the disabilities should not be removed till twenty years after the adverse possession began, they would still have ten years to enter. And thus, thirty years' adverse possession, or more, may be necessary to bar an ejectment. "It may so happen," says Chief Justice Kent, "that the twenty years and more will elapse during the disability, and then ten years will be afterwards allowed cumulatively; or the disability may cease so far within the period of the twenty years as to allow of only twenty years in the whole, though part of that period be covered by the disability. This construction does not allow, to persons laboring under disability, the same number of years after they become of competent ability, as it allows to other persons, who were under no such disability. Such is the policy and the very language of the statute; for it did not mean, as in the case of the limitation of personal actions, that the party should, at all events, be allowed the full period of twenty years after the disability had ceased; because the words of the act are explicit, that extension of the time of making the entry, beyond the twenty years, is in no case to exceed ten years after the disability is removed."<sup>1</sup> This the learned Chief Justice considered as the true exposition of the statute. And, although he says that the question did necessarily arise in that case, and therefore he did not wish the opinion on that point, then expressed by him, to be definitive, yet, upon subsequent deliberation, he reiterated the same opinion, after he was appointed Chancellor.<sup>2</sup> In a still later case, in New York, the court thought it was clear, from the words and policy of the statute, and the repeated ex-

fendant's possession, lasting till another commences, will prevent the party from being barred; as infancy and coverture. *Wilson v. Kilcannon*, 4 Hay. (Tenn.) 182. If an infant female, having a right of action, marries before coming of full age, she is not bound to sue within the time prescribed, after coming to full age: her coverture protects her. *Davis v. Cooke*, 8 Hawkes (N. C.), 608.

<sup>1</sup> *Smith v. Burtis*, 9 Johns. (N. Y.) 174.

<sup>2</sup> *Demarest v. Wynkoop*, 8 Johns. (N. Y.) Ch. 129.

positions which had been given to it, that if twenty years have elapsed since the right of action first accrued, and ten of those years have been free from disability, the right of entry was barred; that is, the party is not entitled to twenty years, after the disability ceases, to bring his action, but to ten years only, provided, at the expiration of those ten years, twenty years have elapsed since the right of entry accrued.<sup>1</sup>

482. It was held by Lord Mansfield, that if a right of entry accrue to a feme covert, and she die, leaving her heir within age, the statute does not begin to run until after the disability of the heir ceases.<sup>2</sup> This opinion, it will be perceived, is contrary to the preceding authorities, which construe the statute to run in such a case from the death of the mother. It is also contrary to the opinion of Mr. Sheppard, in his *Touchstone*, p. 31, who, in speaking of fines, says, if the ancestor being abroad at the time of levying the fine do not return, but die out of the realm, the heir must claim within five years from the time his title as heir accrues, notwithstanding any disability, for the right did not first accrue to him, but to his ancestor; and again, if women covert die under coverture, their heirs shall be allowed five years; but no disability in them or in their heirs shall protract the bar beyond five years from the death of the ancestor dying under a disability. Mr. Preston, in his second volume of *Abstracts of Title*, p. 341, concurs in this opinion of Mr. Sheppard, and says that successive owners under the same estate cannot protect themselves from asserting their claim, on account of successive disabilities; but every claim must be barred by the operation of the fine with proclamations, unless it shall be asserted during the

<sup>1</sup> *Jackson v. Johnson*, 5 Cow. (N. Y.) 74. [*Wilson v. Betts*, 4 Denio (N. Y.), 201.]

<sup>2</sup> The case was, the tenant in tail died leaving issue in tail, a granddaughter, a feme covert; the granddaughter died covert, leaving issue in tail, two sons, infants; the elder son attained the age of twenty-one, and died; the younger attained the age of twenty-one, but did not issue his writ of formedon until fourteen years after, and was therefore barred even by Lord Mansfield's construction. *Cotterell v. Dutton*, 4 Taunt. 826. A similar ground was once taken by the Supreme Court of Connecticut, in a case which was subsequently overruled by the cases before referred to. The case was: A was seised of real estate and died, leaving B an infant and feme covert, who died before her husband, in 1755, leaving C, an infant daughter, who was married during infancy to D. In an action by D and C for the estate, commenced in 1804, against E, who had been in possession holding adversely nearly sixty years, it was held by the court that the claim of the plaintiff to possession was not barred. *Eaton v. Sandford*, 2 Day (Conn.), 523, and see Arch. Pl. 87.

life of the person to whom the right of entry or of action first accrues, or within five years of his death, whatever may be the state of the rightful owner in respect of disabilities.<sup>1</sup>

483. The intervention of a particular estate, however, will suspend the operation of the statute so as to preserve the remedy of persons under a disability, when otherwise it would have been lost. Thus it was held in New York, that the statute cannot be set up in bar to a recovery against the grandchildren of a person dying seised, against whom there was no adverse possession, where, at the decease of the grandfather, the mother of the lessors, through whom the estate descended to them, was under coverture, against whom the statute had not begun to run, and the action is brought within ten years after the decease of their father, the tenant by the curtesy.<sup>2</sup> Where an adverse possession commenced in 1772, when A was tenant by the curtesy, and the reversionary estate in his daughter, who was an infant: The daughter married B, in 1783, and A, the tenant by the curtesy, died in 1784; B, the husband, died in 1807; and his widow, the daughter of A, was the lessor of the plaintiff. When the adverse possession commenced, the only disability which existed, independent of the estate by the curtesy, was the infancy of the lessor. Her coverture, as has been stated, did not commence until 1783, and the particular estate terminated in 1784. It was contended, that the lessor being then of full age, and having a right of entry, was bound to exact it, and that she could not avail herself of her coverture, it being urged that her coverture was a second or cumulative disability, which was never allowed. But the court held that, during the particular estate, no right of entry had descended to the lessor, and that therefore the statute did not begin to run till the death of tenant by the curtesy, and that the first disability was coverture.<sup>3</sup>

484. Where there has been an adverse possession during the time limited by the statute, against tenants in common, one of

<sup>1</sup> See also the same doctrine countenanced in 3 Co. Litt. by Thomas, p. 18, n. 1. [In Ohio, the heirs of a non-resident are barred by an adverse possession of land for twenty years, during the lifetime of the ancestor. *Lewis v. Baird*, 3 McLean (U. S.), 56.]

<sup>2</sup> *Moore v. Jackson*, 4 Wend. (N. Y.) 58.

<sup>3</sup> *Jackson v. Sellick*, 8 Johns. (N. Y.) 262, which is recognized in *Jackson v. Johnson*, 5 Cowen (N. Y.), 74. See also *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 390; 8 Inst. 216; 2 Co. 93; 10 Ib. 49, 99; Hob. 265.

whom is within the saving of the statute, the right of the others is not thereby saved.<sup>1</sup> And so it seems, if an estate descend to parceners, one of whom is under a disability, which continues for more than twenty years, and the other does not enter within the twenty years, the disability of the one does not preserve the title of the other. In an action of ejectment by two coheirs, the declaration contained two counts, the first of which stated a demise by Elizabeth Langdon, widow, and William Barrett. The second count was on the demise of Elizabeth Langdon only. On the trial, in 1809, both of the lessors of the plaintiff established their title as heirs of William Peart. In 1739, a person named Ley, who was then seised of the premises, devised them to Elizabeth Ley, and the heirs of her body, and in case she should die without issue of her body, then over to John Peart, his heirs and assigns for ever. The testator died in 1739. Elizabeth Ley, the tenant in tail, died without issue in 1756. John Peart died before her, in 1740, leaving William Peart his son and heir, who died in 1763, leaving two sisters his coheiresses, one of whom, Elizabeth Langdon, was a feme covert at the time of his death, and so continued until 1808, when her husband died. The other sister, Mary Peart, who afterwards married a person named Barrett, and was the mother of the other lessor of the plaintiff, was of full age, and was unmarried at the time of her brother's decease. Mansfield, Ch. J. In this case were two demises, and a verdict passed for the plaintiff on the second demise by Elizabeth Langdon, the fact being that the estate descended to Elizabeth Langdon, a feme covert, and Mary Peart, in parcenary, and that twenty years elapsed without Mary Peart's entering. And the only question was, whether the lessor of the plaintiff was not entitled to judgment on the first count, on the idea that, as Elizabeth Langdon was under a disability at the time of the descent cast, that circumstance was to operate in favor of the other coparcener. We are of opinion, that the entry of Elizabeth Langdon cannot give a right of entry to Barrett, whose right was before barred by the statute of limitations; but that the judgment must be for the lessor of the plaintiff for the moiety only.<sup>2</sup> It was held, by Mr.

<sup>1</sup> See *Jackson v. Bradt*, 2 Caines, 169.

<sup>2</sup> *Roe v. Rowston*, 2 Taunt. 441. [*Riggs v. Dooley*, 7 B. Mon. (Ky.) 236; *Moore v. Armstrong*, 10 Ohio, 11; *Bronson v. Adams*, Ib. 185; *Wade v. Johnson*, 5 Humph. (Tenn.) 117; *Woodward v. Clarke*, 4 Strobb. (S. C.) Eq. 167; *Jordan v. Thornton*,



Justice Story, in an action of trespass brought by several plaintiffs, who were cotenants, in which the disability of only some of the plaintiffs was relied on in favor of all, that when the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action;<sup>1</sup> and the case of *Doroure v. Jackson*<sup>2</sup> is cited. Consequently, in the case of joint-tenancy, where the parties are compelled to join, the disability of one of them would afford no advantage in any way, unless the party subject to disability should, in an action of ejectment, sue alone, and his demise to the lessee should be construed as a severance of the joint estate, and as converting it to an estate in common.

7 Ga. 517; *Pendergrast v. Gullatt*, 10 Ga. 218. But in *Meese v. Keefe*, 10 Ohio, 862, and *Lockwood v. Wildman*, 18 Ohio, 430, a different doctrine seems to be held.] See also *Cullen v. Motzer*, 18 Serg. & Rawle (Penn.), 850. A coparcener may bring ejectment on his separate demise. *Jackson v. Sample*, 1 J. C. 281.

<sup>1</sup> *Marsteller v. M'Clean*, 7 Cranch (U. S.), 156.

<sup>2</sup> 4 T. R. 516. And see also *Dickey v. Armstrong*, 1 Marsh. (Ky.) 89; *Simpson v. Shannon*, 3 Ib. 362; *Turner v. Debell*, 2 Ib. 384; *Johnson v. Harris*, 8 Hayw. (Tenn.) 113; *Thomas v. Machir*, 4 Bibb (Ky.), 412; *Riden v. Frien*, 2 Murph. (N. C.) 577. Where there are several coheirs lessors of the plaintiff in an action of ejectment, and joint and several demises are laid in the declaration, and one of the coheirs, who labors under no disability, fails to bring his action within the time limited by law, though his right to recovery will be barred by the act, it will not affect his coheirs who were under disability. The proviso in the act is personal, and applies to all those who labor under any of the enumerated disabilities. *Lewis v. Barksdale*, 2 Brockenb. (Cir. Co.) 486. It was held, in South Carolina, that the infancy of one of several persons, having a joint interest in land, will protect the rights of those who are of full age, from the operation of the statute. *Lahiffe v. Smart*, 1 Bail. (S. C.) 192. This was in conformity to former decisions, and the settled practice. But Nott, J., who gave the opinion of the court, said: "The correctness of the rule may be questionable; but this court does not feel at liberty to innovate on a rule of law which has long been regarded as settled, and has been acted upon for a great length of time. I do not know that our courts have permitted the rights of cotenants to be saved by any other disability than that of infancy. The question in relation to other cases is still open for consideration. [And this rule is still adhered to. *Thompson v. Gaillard*, 3 Rich. (S. C.) 418. So also in Kentucky. *Harlan v. Seaton*, 18 B. Mon. 312.] If several persons be heirs, and one of them a *feme covert*, at the time when the adverse possession commences, and so continues until the time of bringing the action by the plaintiff, her disability will not prevent the bar as to the others under no disabilities. For each tenant in common as heirs by our (Tenn.) act of assembly may sue for his own share, notwithstanding the *feme* may not be found. *Johnson v. Smith*, 5 Hayw. (Tenn.). [So in New York. *Carpenter v. Schermerhorn*, 2 Barb. (N. Y.) Ch. 314.] In Connecticut, it has been held, that an adverse possession against two tenants in common, one of whom is within the savings of the statutes, operates against the other, and so with coparceners. *Doolittle v. Blakesly*, 4 Day (Conn.), 265; *Sandford v. Button*, Ib. 310. [And see also *Wells v. Rayland*, 1 Swan (Tenn.), 501; *Baker v. Grundy*, 1 Duvall (Ky.), 281.]



## CHAPTER XXXVII.

## OF JUDICIAL EXCEPTIONS, ETC.

485. FROM authorities which have been cited throughout the preceding pages, it obviously appears, that statutes of limitations are to be strictly construed by courts of justice, and that, although there have been some instances in which this rule has been departed from, owing to conceptions of inherent equity, they have altogether failed in establishing a contrary precedent.<sup>1</sup> Chancellor Kent, in *Demarest v. Wynkoop*,<sup>2</sup> maintained that it would be not only impolitic, but contrary to established rule, both in law and equity, to depart from the plain meaning and *literal expression* of these statutes. It has been shown, that the persons almost invariably enumerated in general acts of limitation, as excepted from their operation, could not be so by judicial construction, and unless so expressly declared to be by the legislature.<sup>3</sup> Sir William Grant, in *Beckford v. Wade*,<sup>4</sup> adverted to the case of defendants absent, or out of the realm, before the statute of Queen Anne. It was in vain attempted, he said, upon general reasoning, in many cases, to introduce an exception in favor of the plaintiff, in a case where the defendant was out of the realm. A plaintiff out of the realm, he said, might prosecute a suit by attorney; but, when the defendant is out of the realm, it is very hard to call upon the plaintiff to institute a suit which, in most cases, must be wholly fruitless; and yet, until the statute of Queen Anne was made, that case formed no exception, and the statute of limitations barred the action.

486. In a case in the Supreme Court of the United States, the same doctrine was adhered to. The case was admitted to be within the act of limitations of the State of Tennessee, and not within the letter of the exceptions. It was held by the court, that, notwithstanding the laws of the United States prohibited all per-

<sup>1</sup> See *ante*, Chap. II. § 23.

<sup>2</sup> *Demarest v. Wynkoop*, 3 Johns. (N. Y.) Ch. 146.

<sup>3</sup> See *ante*, Chap. XIX. §§ 194, 205.

<sup>4</sup> *Beckford v. Wade*, 17 Ves. 88.

sons from surveying or marking any lands within the Indian Territory, and the plaintiffs could not, therefore, survey the land granted to them, the defendants were entitled to hold the part possessed by them, by virtue of such possession. The claim of the plaintiff to be excepted from the operation of the statute was founded solely on the *impediments* to the assertion of their own title. The language used by the court was, that, "wherever the situation of a party was such as, in the opinion of the legislature, to furnish a motive for excepting him from the operation of the law, the legislature has made the exception: and that it would be going too far for the court to add to those exceptions." It had never been determined, said Chief Justice Marshall, who delivered the opinion of the court, "that the impossibility of bringing a case to a successful issue, from causes of uncertain duration, *though created by the legislature*, shall take a case out of the operation of the act of limitations, unless the legislature shall so declare it."<sup>1</sup>

487. Agreeably to the above position advanced by Chief Justice Marshall, a discharge under an insolvent law does not take from the debtor the protection which is afforded by the statute, even by virtue of the equity of the exception of being "beyond seas," or "out of the State;" although the reason why such absence of a defendant excuses the plaintiff from prosecuting is, that he cannot be reached by a process of the courts.<sup>2</sup> A. B. made his promissory note on the 7th April, 1812, in favor of C. D., who indorsed it to E. F. An act of assembly was passed in Pennsylvania on the 13th March, 1812, which was, in fact, a bankrupt law. On the 31st March, 1817, the Supreme Court of Pennsylvania held, that the said act was constitutional, and a discharge under it a bar to a recovery.<sup>3</sup> The case, on which this decision was made, was removed to the Supreme Court of the United States, and there reversed on the 13th February, 1821.<sup>4</sup> More than six years after the cause of

<sup>1</sup> *McIver v. Ragan*, 2 Wheat. (U. S.) 25.

<sup>2</sup> See *ante*, Chap. XIX. § 194. It was held that the insolvent act of 52 Geo. III., by which a right was reserved to creditors to obtain payment out of the future effects of the insolvent, did not prevent the operation of the statute of limitations. *Browning v. Paris*, 5 Mees. & Welsb. Ex. 117. Discharge under insolvent law does not prevent the operation of the statute upon the claim of the creditor. *Stetor v. Oram*, 1 Whart. (Penn.) 106; *Shoenberger v. Adams*, 4 Watts (Penn.), 480; overruling the dictum of Huston, J., in *Feather's Appeal*, 1 Penn. 822.

<sup>3</sup> *Farmers' and Mechanics' Bank v. Smith*, 8 Serg. & Rawle (Penn.), 68.

<sup>4</sup> 6 Wheat. (U. S.) 18.

action arose on the said note, E. F. brought a suit on it against A. B. ; and, on a case stated, the following question was submitted for the opinion of the court: "Did the act of limitations run against the plaintiff while the act of 13th March, 1812, was held by the Supreme Court of Pennsylvania to be constitutional?" It was held by that court, that these circumstances did not stop the running of the statute.<sup>1</sup>

488. It has even been considered, that, when courts of justice are shut up in time of war, so that no process could be instituted, the statute of limitations will continue to run. This is a very strong case ; but it is stated to have been so held by Bridgman, Ch. J., who thought that, though courts were shut up, and consequently no original could be filed, yet the statute would bar the action. And the reason assigned was, that the statute is general, and must affect all cases which are not specially exempted.<sup>2</sup> This resolution, it is also said, was often approved by Lord Chief Justice Holt.<sup>3</sup> But the opinion of Plowden was, that things happening by an invincible necessity, though they be against the common law, or an act of Parliament, shall not be prejudicial ; and that to say that the courts were shut is a good excuse on voucher of record.<sup>4</sup> There authorities all relate to the civil and domestic wars in England, when the courts of justice were shut, and, consequently, when a party, if he was ever so much disposed, could assert no claim, however just and legal. Such an extraordinary state of things is certainly not to be presumed, and therefore not contemplated by the legislature of any country ; and, consequently, the legislature, in limiting a period for the commencement of suits, do not intend that an individual, after suffering all the inconveniences accompanying so serious an event, shall also be deprived of the rights which belonged to him before it occurred. And this was not only the opinion of Plowden, but of Sir Edward Coke, who says, "that, in times of domestic war, when the courts of justice are shut, a descent shall not take away an entry, though the disseisin was in times of peace ; for, if it did, the disseisee would be without all remedy, there being no courts open for him to bring his action in."<sup>5</sup> The law in England, it clearly appears, however, was

<sup>1</sup> *Hudson v. Carey*, 11 Serg. & Rawle (Penn.), 10.

<sup>2</sup> *Hall v. Wybourne*, 2 Salk. 420 ; *Aubrey v. Fortescue*, 10 Mod. 266.

<sup>3</sup> See opinion of Sir William Grant, in *Beckford v. Wade*, 17 Ves. 92.

<sup>4</sup> Plod. 9 b. [So settled now. *Ante*, § 196.]

<sup>5</sup> *Co. Litt.* 249 a.

otherwise considered. And this appearance is rendered still more clear by an act of Parliament, in the first year of William and Mary, by which it was enacted, that the period from the 10th of December, when King James departed, until the 12th of March, when King William assumed the government, should not be accounted any part of the time within which any person, by virtue of the statute of limitations, might bring his action; but that he should have so much allowance of time as was from the 10th of December to the 12th of March for bringing his action.<sup>1</sup> The treaty of peace between Great Britain and the United States, of 1783, prevented the operation of the statute upon British debts contracted before that time.<sup>2</sup>

<sup>1</sup> Snode v. Ward, 3 Lev. 288.

<sup>2</sup> Hopkirk v. Bell, 3 Cranch (U. S.), 454. And see also 2 Ib. 411; 1 Dallas (U. S.), 411; 1 Johns. (N. Y.) Ca. 76; 1 Desauss. (S. C.) 427. [Stay laws which do not interfere with the right of action, and of keeping the judgment alive by *scire facias* or other proper process, do not suspend the operation of the statute, though they do prevent the taking out of execution. Exceptions will not be engrafted upon the statute, unless in cases where no *laches* can be imputed, and when it is impossible by suit or otherwise, to keep the cause of action alive, and prevent the operation of the statute. Kirkland v. Krebs, 34 Md. 98. A State law prohibiting suits for slaves, or the hire thereof, was held constitutional by the State court, but afterwards unconstitutional by the United States Court. It was nevertheless held that the fact that a writ could not be successfully prosecuted under it till after the decision of the latter court did not affect the operation of the statute upon claims under the law. Harris v. Gray, 49 Ga. 585.]



## A P P E N D I X.

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[The marginal references are to paging of the previous edition.]

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### L I M I T A T I O N   O F   A C T I O N S.

*By the Statute 32 Hen. VIII. Ch. 2.*

No person shall sue, have, or maintain any writ of right, or make any prescription, title, or claime to, for any Mannors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corodies, or other Hereditaments of the possession of his or their Ancestors or predecessors; and declare and alleadge any further seisin or possession of his or their Ancestor or predecessor, but onley of the seisin or possession of his Ancestor or predecessor, which hath beene, or now is, or shall be seised of the said Mannors, Lands, &c., or other Hereditaments within sixtie yeares next before the *teste* of the same writ, or next before the said prescription title or claime so sued, commenced, brought, made, or had.

No person or persons shall sue, have, or maintaine any Assesse of Morduncestor, Cosinage, Ayel, writ of entrie upon disease done to any of his Ancestors or predecessors, or any other action possessory upon the possession of any of his Ancestors or predecessors, for any Mannors, Lands, Tenements, or other Hereditaments of any further seisin or possession of his or their Ancestor or predecessor, but onley of the seisin or possession of his or their Ancestor or predecessor, which was, or hereafter shall be seised of the same Mannors, Lands, Tenements, or other Hereditaments within fifty years next before the *teste* of the original of the same writ to bee brought.

No person nor persons shall sue, have, or maintaine any action for any Mannors, Lands, Tenements, or other Hereditaments of or upon his or their own seisin above thirty years next before the *teste* of the originall of the same writ to be brought, &c.

Nor shall make any avowry or cognisance for any Rent, suite, or service, and alleadge any seisin of any suite of service in the same avowry or cognizance in the possession of his or their Ancestors or predecessor or pred-

ecessors, or in his own possession, or in the possession of any other whose estate shall pretend or claim to have above fiftie years next before the making of the said Avowry or cognisance.

[\* ii] \* All *formedons* in reverter, *formedons* in remainder, and *Scire facias*, upon fines of any Mannors, Lands, Tenements, or other Hereditaments, shall bee sued and taken within fiftie years next after the title and cause of action *fallend*, and at no time after the said fiftie yeares passed.

If any person or persons doe at any time sue any of the said actions or writs for any Mannor, Lands, Tenements, or other Hereditaments, or make any avowry, cognisance, prescription, title, or claime of, or for any rent, suite, service, or other Hereditaments, and cannot prove that he or they, or his or their Ancestors or predecessors were in actual possession or seisin of, or in the same Mannors, Lands, Tenements, and Hereditaments, and at any time within the yeares before limited in this act, and in manner and forme aforesaid ; if the same be traversed or denied by the partie, person, or defendant, then after such triall therein had, all and every such person and persons and their heires, shall from thenceforth be utterly barred forever of all and every the said writs, actions, avowries, cognisance, prescription, title, and claim hereafter to be sued, had, or made of, and for the same Mannors, Lands, &c., or other the premises, or any part of the same.

Provided always, that every person and persons which now have any of the said actions, writs, avowries, *Scire facias*, *Com.* Title, cognisance, title, claim, or prescription depending ; or that shall hereafter bring any of the said actions, or make any of the said avowries, prescription, title, &c., at any time before the Feast of the Ascension of our Lord, 1546, shall alleadge the seisin of his or their Ancestors or predecessors, and his owne possession and seisin, and have also all other like advantage to all intents and purposes in the same writs, actions, avowries, cognisances, and prescriptions, titles, and clayme, as he or they might have had at any time before the making of this Statute.

Provided also, that if any person *being within the age of twenty-one yeares*, covert, baron, or in prison, or out of this Realm of England, nor having cause to sue or bring any of the said writs, actions, or to make any avowries, cognisances, prescriptions, titles, or claymes, that such person or persons may sue, commence, or bring any of the said writs or actions, or make any of the said avowries, cognisances, prescriptions, title, or claime at any time within six yeares next after such person, nor being within age shall accomplish the age of 21 yeares, or within six yeares next after such person now being in prison shall bee enlarged, or never being out of the Realme, come into the Realme. And that every such person in their said actions, writs, avowries, cognisances, prescriptions, title or claime to be made, &c., within the said six yeares, shall alleadge within the said six



yeares, the seisin of his or their Ancestors or predecessors, or of his owne possession, or of the possession of those whose estate hee shall then clayme. And also within the same six yeares shall have all and every such advantages in the same as he or they might have had before the making of this act.

\* Provided, also, that if it happen the said person *now being within* [\* iii] *age* covert baron in prison or out of this Realme, having cause to sue or bring any of the said writs, avowries, cognisances, descriptions, &c. to die within age, or during condition, &c. or to disease within six yeares next after such person shall attain his full age, or be at large, &c. and no determination or judgment had of such titles, actions, or rights to them so accrued, then the next heire to such person or persons shall have and enjoy such liberty and advantage to sue, &c. within six years next after the death of such person or persons now imprisoned, &c. in such manner as the same infant after his full age, or the said woman covert after, &c. should or might have had within six years then next ensuing, by virtue of the provision last before rehearsed.

Provided, also, that if any person before Ascension, 1546, sue or commence any of the said writs, &c. or make any avowry, &c. and the same happen by the death of any of the sayd parties, to bee abated before judgment or determination thereof, then the same person or persons being demandants or avowants, or making such title prescription, &c. being then alive, and if not, then the next heire of such person so deceased may pursue his action, and make his avowry, &c. upon the same matter within one yeare next after such action or suite abated, and shal enjoy all such advantage to make their said titles within the said one yeare, as the demandant demandants in such writs, &c. should or might have had or enjoyed in the said former action or suite.

Provided, furthermore, that if any false Verdict happen hereafter to be given or made in any of the said actions, suites, avowries, prescriptions, titles, or claymes; that then the partie grieved by reason of the same, shall and may have his Attaint upon every such Verdict so given or made, and the plaintiffe in the Attaint upon judgment for him given, shall have his recovery, execution, and other advantage in like manner as heretofore hath been used, anything in this Statute contained, to the contrary notwithstanding.

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*By the Statute 21 James I. Ch. 16, entitled, "An act for limitation of actions, and for avoiding of suits in Law."*

For quieting of men's estates and avoiding of suits, be it enacted by the King's most excellent majesty, the Lords spiritual and temporal, and Com-

mons, in this present Parliament assembled, that all writs of formedon in descender, formedon in remainder, and formedon in reverter, at any time hereafter to be sued or brought, of, or for any manors, lands, tenements, or hereditaments, whereunto any person or persons now hath or have [\* iv] any \* title, or cause to have or pursue any such writ, shall be sued or taken within twenty years next after the end of this present session of Parliament: And after the said twenty years expired, no person or persons, or any of their heirs, shall have or maintain any such writ, of or for any of the said manors, lands, tenements, or hereditaments; (2) and that all writs of formedon in descender, formedon in remainder, formedon in reverter, of any manors, lands, tenements, or other hereditaments whatsoever, at any time hereafter to be sued or brought by occasion or means of any title or cause hereafter happening, shall be sued or taken within twenty years next after the title and cause of action first descended or fallen, and at no time after the said twenty years; (3) and that no person or persons that now hath any right or title of entry into any manors, lands, tenements, or hereditaments now held from him or them, shall thereinto enter, but within twenty years next after the end of this present session of Parliament, or within twenty years next after any other title of entry accrued; (4) and that no person or persons shall at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his or their right or title, which shall hereafter first descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made; any former law or statute to the contrary notwithstanding.

II. Provided, nevertheless, That if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be, or shall be, at the time of the said right or title first descended, accrued, come, or fallen within the age of one-and-twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry as he might have done before this act: (2) so as such person and persons, or his or their heir and heirs, shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same, and at no time after the said ten years.

III. And be it further enacted, That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action, *sur trover*, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt

grounded upon any lending or contract without speciality; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the end of this present session of Parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after; \* (that is to say,) (2) the said actions [\* v] upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of Parliament, or within six years next after the cause of such actions or suit, and not after; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of Parliament, or within four years next after the cause of such actions or suit, and not after; (4) and the said action upon the case for words, within one year after the end of this present session of Parliament, or within two years next after the words spoken, and not after.

IV. And, nevertheless, be it enacted, That if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any the said actions shall be brought by original, and the defendant therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

V. And be it further enacted, That in all actions of trespass *quare clausum fregit*, hereafter to be brought, wherein the defendant or defendants shall disclaim in his or their plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence, or involuntary, the defendant or defendants shall be permitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue; (2) and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suits concerning the same.

VI. And be it further enacted by the authority aforesaid, That in all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons in any the courts of record at Westminster, or in

any court whatsoever, that hath power to hold plea of the same, after the end of this present session of Parliament, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the [\* vi] damages so \* given or assessed amount unto, without any further increase of the same; any law, statute, custom, or usage to the contrary in anywise notwithstanding.

VII. Provided, nevertheless, and be it further enacted, That if any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be, or shall be, at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should be done.

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*By Statute of 3 and 4 William IV. Ch. 27.*

By this Act, unprefaced by any recital, it is enacted,

I. That the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this Act, except where the nature of the provision or the context of the Act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a spiritual and eleemosynary corporation sole), and also to any share, estate, or interest in them or any of them, whether the same shall be a freeholder or chattel interest, and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through, or under, or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England,

tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat; and the word "person" shall extend to a body politic, \* corporate or collegiate, and to a class of creditors or other [\* vii] persons as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

II. That after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.

III. That in the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of said land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or re-

ceipt by virtue of such instrument; and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have [\* viii] \* first accrued at the time at which such estate or interest became an estate or interest in possession; and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.

iv. Provided, always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.

v. Provided, also, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates, in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

vi. That, for the purposes of this Act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

vii. That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall

be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

VIII. That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled \* subject thereto, or of the person through whom he [\* ix ] claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

IX. That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent subject to such lease, or of the person through whom he claims, to make an entry or distress, or to bring an action after the determination of such lease shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

X. That no person shall be deemed to have been in possession of any land, within the meaning of this Act, merely by reason of having made an entry thereon.

XI. That no continual or other claim upon or near any land shall preserve any right of making an entry of distress, or of bringing an action.

XII. That when any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons or any of them.

XIII. That when a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof,



such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

XIV. Provided always, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession [ \* x ] or receipt of or by \* the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments if more than one, was given.

XV. Provided also, that when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or interest at any time within five years next after the passing of this Act.

XVI. Provided always, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned (that is to say), infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

XVII. Provided nevertheless, that no entry, distress, or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained

under one or more of such disabilities during the whole term of such forty years, or although the term of ten years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.

xviii. Provided always, that when any person shall be under any of the disabilities hereinbefore mentioned, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have \*first accrued, and shall depart this life without [\* xi] having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person.

xix. That no part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this Act.

xx. That when the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right, or possibility, in reversion, remainder, or otherwise, in or to the same land or rent, no entry, distress, or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right, or possibility, unless in the mean time such land or rent shall have been recovered by some person entitled to an estate, interest, or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

xxi. Then when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress, or action shall be made or brought by any person claiming any estate, interest, or right which such tenant in tail might lawfully have barred.

xxii. That when a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or

distress, or bringing an action to recover such land or rent, no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

xxiii. That when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates, to take effect after or in defeasance of his estate tail, and any person [\* xii] shall, by virtue \* of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate, which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twenty years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest, or right, to take effect after or in defeasance of such estate tail.

xxiv. That after the said 31st of December, 1833, no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity.

xxv. Provided always, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him.

xxvi. That in every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent, of which he, or any person through whom he claims, may have been deprived by such

fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall or with reasonable diligence might have been first known or discovered; provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he had made the purchase, did not know, and had no reason to believe, that any such fraud had been committed.

xxvii. Provided always, that nothing in this Act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity, in \*refusing relief on the ground of acquiescence or other- [\* xiii] wise to any person whose right to bring a suit may not be barred by virtue of this Act.

xxviii. That when a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the mean time an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent, by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate

or interest therein, and not to any ascertained part of the mortgaged money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money, which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

xxix. Provided always, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital, or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit, to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right

of such corporation sole, or of his predecessor, to make such entry [\* xiv] or distress or bring such \*action or suit, shall first have accrued;

that is to say, the period during which two persons in succession shall have held the office or benefice, in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years, and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said 31st of December, 1833, no such entry, distress, action, or suit shall be made or brought at any time beyond the termination of such period.

xxx. That after the said 31st of December, 1833, no person shall bring any *quare impedit* or other action or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; that is to say, the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as with the times of such incumbencies will make up the full period of sixty years.

xxxi. Provided always, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty or the ordinary by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as

aforesaid ; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this Act, be deemed a continuation of the incumbency of the clerk so made bishop.

xxxii. That in the construction of this Act every person claiming a right to present to or bestow any ecclesiastical benefice as patron thereof, by virtue of any estate, interest, or right, which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any *quare impedit*, action, or suit shall be limited accordingly.

xxxiii. Provided always, that after the said 31st of December, 1833, no person shall bring any *quare impedit*, or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron \* thereof, after the expiration of one hundred years from [\* xv] the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share, or right, held or derived under the same title.

xxxiv. That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.

xxxv. That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act.

xxxvi. That no writ of right patent, writ of *quia dominus remisit curiam*, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationabilibus divisis, writ of right of ward, writ de consuetudinibus et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonio, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize of novel disseisin, nuisance, darrein-presentment, juris utrum, or mort d'ancestor,



writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in priona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui invitum, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry, quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet, or a quare impedit, or an ejectment), and no plaint in the nature of any such writ or action (except a plaint for free bench or dower), shall be brought after the 31st of December, 1834.

[\* xvi] \* xxxvii. Provided always, that when, on the said 31st of December, 1834, any person, who shall not have a right of entry to any land, shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the 1st of June, 1835, in case the same might have been brought if this Act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired.

xxxviii. Provided, also, that when, on the said 1st of June, 1835, any person whose right of entry to any land shall have been taken away by any descent, cast, discontinuance, or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said 1st of June, 1835, but only within the period during which, by virtue of the provisions of this Act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away.

xxxix. That no descent, cast, discontinuance, or warranty, which may happen or be made after the said 31st of December, 1833, shall toll or defeat any right of entry or action for the recovery of land.

xl. That after the said 31st of December, 1833, no action or suit, or other proceedings shall be brought, to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the mean time some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent; and in such case no such action, or suit, or proceeding, shall be



brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

XL I. That after the said 31st of December, 1833, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit, for a longer period than six years next before the commencement of action or suit.

XL II. That after the said 31st of December, 1833, no arrears of rent or of interest, in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent : Provided, \* nevertheless, that where any prior mortgagee, or other incum- [\*xvii] brancer, shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to subsequent mortgage or other incumbrance, on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

XL III. That after the said 31st of December, 1833, no person claiming any tithes, legacy, or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same, but within the period during which he might bring such action or suit at law or in equity.

XL IV. Provided, always, that this Act shall not extend to Scotland ; and shall not, so far as it relates to any right to permit to or bestow any church, vicarage, or other ecclesiastical benefice, extend to Ireland.

XL V. That this Act may be amended, altered, or repealed, during this present session.

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*Comments upon the above Statute, with Notes and References to Decisions under it, from Brown on Actions at Law.*

Section 1. The time within which actions to recover realty, &c., must be brought, is regulated by the 3 & 4 Will. IV. c. 27. By the 1st section of the Act, the meaning of the words in the Act is defined ; it enacts (*inter alia*)

that the word "land" shall extend to manors, messuages, and all other corporeal hereditaments whatsoever, and also to tithes (other than tithes belonging to a *spiritual or eleemosynary corporation sole*), and also to any share or interest in them, whether the same be a freehold or chattel interest, and whether they be of freehold, copyhold, or any other tenure; and that the word "rent" shall extend to all heriots, services, and suits for which a distress may be made, and to annuities charged upon land (except moduses or compositions belonging to a *spiritual or eleemosynary corporation sole*), and that the word "person" shall extend to a body politic, corporate, or collegiate, and to a class of creditors or other persons, as well as to an individual; and that the singular number shall embrace the plural, and the masculine gender the feminine.

Section 2 enacts, that after the 31st day of December, 1833, no person shall make an entry or distress, or bring an action to recover *any* [\* xviii] *land or \* rent,*<sup>1</sup> *but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued.*

Sections 3, 4, 5, 6, 7, 8, and 9 define the period from which the statute begins to run (where a party is not under disability), which may be thus briefly stated, namely, where the claimant was, in respect of the estate or interest claimed, himself once in possession, or claims through a party who was once in possession of the property, or in the receipt of the rents or profits, the statute runs from the time when he was dispossessed, or discontinued such possession or receipts.<sup>2</sup>

Where the claimant claims on the death of one who died in possession of the land or receipt of the rents or profits thereof, the statute runs from the time of the death, and this even in the case of an administrator,<sup>2</sup> by section 6, which see, *post*.

Where the claimant derives his right under any instrument (other than a will), the statute runs from the time when under the instrument he was entitled to the possession.<sup>3</sup>

In the case of remainders or reversions,<sup>2</sup> the statute runs from the time when the remainder or reversion becomes an estate in possession.<sup>3</sup>

Where the claimant claims by reason of a forfeiture or breach of condition, the statute runs from the time of the forfeiture incurred, or breach of condition broken.<sup>3</sup>

But section 4 provides, *that when any right to make any entry or distress, or to bring any action to recover any land or rent, by reason of any forfeiture*

<sup>1</sup> A rent reserved on a demise is not within this section. *Grant v. Ellis*, 9 M. & W. 118.

<sup>2</sup> Sections 3 and 6.

<sup>3</sup> A lessor is within this section when the rent has not been received adversely. 7 M. & W. 131.

*or breach of condition*, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, *the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued* in respect of such estate or interest *at the time when the same shall have become an estate or interest in possession*, as if no such forfeiture or breach of condition had happened.

And by section 8, it is provided, that a right to make an entry or distress, or to bring an action to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof, or such rent shall have been received, notwithstanding the person claiming such land, or some person through \* whom he claims, shall at any time previously to [\* xix] the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent.

Section 6 enacts, that, *for the purpose of this Act, an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of letters of administration.*

In case of a tenancy from year to year (without lease in writing), the statute runs from the end of the first year *or* the last payment of rent (which shall *last* happen).<sup>1</sup>

In case of a lease in writing, reserving more than 20s. rent,<sup>2</sup> if the rent be received by a party wrongfully claiming the land, subject to the lease, and no payment of the rent be afterwards made to the party rightfully entitled, the statute runs from the time when the rent was first so received by the party wrongfully claiming; and the party rightfully entitled has no further right on the determination of the lease.<sup>3</sup>

In the case of tenancy at will,<sup>4</sup> the statute runs from the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, *at which time the tenancy at will shall be deemed to*

<sup>1</sup> Section 8.

<sup>2</sup> Section 9.

<sup>3</sup> A lessor is a reversioner within the 8d section, where he merely discontinues the receipt of the rent; he has, therefore, twenty years from the determination of the lease within which to claim; *Doe d. Davey v. Oxenham*, 7 M. & W. 181. And the discontinuing to receive rent for more than twenty years, where there is a lease, does not affect the right to recover the arrears of rent, as the 2d section does not apply to rent under a demise. *Grant v. Ellis*, 9 M. & W. 118.

<sup>4</sup> Section 7.

*have determined.* But the clause provides that no mortgagor or *cestui que trust* shall be deemed a tenant at will, within the meaning of the Act, to his mortgagee or trustee.

Section 10 enacts, that no person shall be deemed to have been in possession of any land within the meaning of this Act merely by reason of having made an entry thereon.

Section 11 enacts, that no continual or other claim upon or near any land shall preserve any right of making an entry or distress, or of bringing an action.

Section 12 enacts, that when any one or more of several persons entitled to any land or rent as coparceners, joint-tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any [\* xx] person or \* persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.<sup>1</sup>

Section 13 enacts, that when a younger brother, or other relation, of the person entitled as heir to the possession or receipt of the profits of any land or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of, or by, the person entitled as heir.

Section 14 provides, and enacts, that when *any acknowledgment* of the title of the person entitled to any land or rent shall have been given to *him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in respect of such rent, then such possession or receipt* of or by the person by whom such acknowledgment shall have been given, *shall be deemed*, according to the meaning of this Act, *to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given at the time of giving the same and the right* of such last-mentioned person, or any person claiming through him, to make an entry or distress, or to bring an action to recover such land or rent, *shall be deemed to have first accrued* at, and not before, the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.<sup>2</sup>

Section 15 gives a party claiming land or rent of which he had been out of possession more than twenty years, five years from the time of pass-

<sup>1</sup> This section is retrospective in its operation. *Culley v. Doe d. Taylerson*, 8 P. & D. 539.

<sup>2</sup> [An answer in chancery, put in within twenty years by the person through whom the defendant claims, in a suit between him and the plaintiff concerning the same property, is an acknowledgment within this statute. *Goode v. Job*, 1 Ellis & E. 6.]

ing the Act within which to enforce his claim, where the possession was not adverse to his right or title at the time of passing the Act.

By section 16, persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, are to be allowed ten years from the termination of their disability or death to enforce their rights.

But by section 17, even though a person be under disability when his claim first accrues, he must enforce it within forty years, even though the disability continue during the whole of the forty years.

And by section 18, no further time is to be allowed for a succession of disabilities.

By section 19, no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any adjacent island (being part of the dominions of his Majesty) are to be deemed beyond seas.

By section 20, when the right of any person to recover any land or rent \* to which he may have been entitled, or an estate or interest in possession shall have been barred by time, any right in reversion, or otherwise, which such person may during that time have had to the same land or rent, shall also be barred, unless in the mean time the land or rent shall have been recovered by some person entitled to an estate which shall have taken effect after or in defeasance of such estate or interest in possession.

Section 21 enacts, that when the right of a tenant in tail of any land or rent shall have been barred, the right of any person claiming any estate or interest which such tenant in tail might have barred, shall also be barred.<sup>1</sup>

Section 22 enacts, that when any tenant in tail shall have died before the bar as against him is complete, no person claiming an estate or interest, &c., which such tenant in tail might have barred, shall enforce his claim but within the period within which the tenant in tail, had he lived, might have recovered.

Section 23 makes possession under an assurance by a tenant in tail, which shall not operate to bar the remainder, a bar to such remainders at the end of twenty years from the time when such assurance, if then executed, would, without the consent of any other person, have barred them.

Section 24 enacts, that no suit in equity shall be brought after the time when the plaintiff, if entitled at law, might have brought an action.

Section 25 enacts, that in cases of *express trust*, the right of the *cestui que trust*, or any person claiming through him, shall be deemed to have first accrued at the time when the land or rent may have been conveyed to

<sup>1</sup> A fine with proclamations by a tenant in tail in possession creates a discontinuance, and the legal fee descends to his heirs at law, the remainder-men therefore cannot maintain ejectment, but are driven to their formedon, which they may bring under the 88th section within the time thereby given. 7 M. & W. 102.

a purchaser for a valuable consideration, and shall then be deemed to have accrued only against such purchaser, or any person claiming through him.<sup>1</sup>

Section 26 enacts, that in case of fraud the right shall be deemed to have first accrued at the time when such fraud shall be, or with reasonable diligence might have been, discovered, but that nothing in that clause shall affect a *bona fide* purchaser for value, not assisting in, and, at the time he purchased, not knowing, and having no reason to believe, such fraud had been committed.

Section 27 provides, that the Act shall not prevent the courts of equity refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by the Act.

[\* xxii] \* Section 28 enacts, that a mortgagor shall be barred by twenty years' possession of the mortgage, unless there be an acknowledgment in writing.<sup>2</sup>

Section 29 enacts, that no land or rent shall be recovered by an ecclesiastical or eleemosynary corporation sole, but within the period during which two persons in succession shall have held the benefice, &c., in respect whereof such land or rent is claimed, and six years after a third person shall have been appointed thereto, if such two incumbencies and six years taken together shall amount to the full period of sixty years, but if they do not amount to sixty years, then during such further time in addition to the two incumbencies and six years as will make up the sixty years.

Section 30 enacts, that no advowson or right of presentation shall be recovered but within the period during which three clerks in succession shall have held the same (all of whom shall have obtained possession thereof adversely to the right of the party claiming), if the three incumbencies shall together amount to sixty years, but if they do not amount to sixty years, then after such further time as with the incumbencies will together make up sixty years.

Section 31 provides, that when an avoidance after a clerk shall have obtained possession of a benefice adversely to the right of the patron, a clerk shall be presented or collated by reason of a lapse, such last-mentioned presentation shall be deemed adverse to the patron, but if such presentation be after promotion to a bishopric, it shall not be adverse to the patron.

Section 32 enacts, that every person claiming a right in an advowson,

<sup>1</sup> This section is confined to cases of express trust, and does not apply to implied trusts. *Doe d. Stanway v. Rock*, C. P., 29 L. J. 194 (East, 1842).

<sup>2</sup> The statute runs in general from the day of the mortgage, and not from the day when default is made. *Doe d. Roylance v. Lightfoot*, 8 M. & W. 558. By the 7 Will. IV. & 1 Vict. c. 28, reciting that doubts had arisen upon the subject, *part payment* of principal or interest is made equivalent to an acknowledgment in writing so as to bar the statute.

which the tenant in tail thereof might have barred, shall be deemed a person claiming through such tenant in tail.

Section 33 enacts, that an advowson shall not be recovered after one hundred years from the time at which a clerk shall have obtained possession thereof adversely to the right of the claimant, unless a clerk has subsequently had possession of the benefice on the presentation of some person having the same right.

Section 34 enacts, that at the determination the period limited by this act to any person for making any entry or distress, or bringing any writ of *quare impedit* or other action or writ, *the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period, shall be extinguished.*

\* Section 35 enacts, that the receipt of the rent payable by any [\* xxiii] tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act.

By section 36, all real and mixed actions are abolished after the 31st December, 1834, except dower, right of dower, *quare impedit*, and ejectment.<sup>1</sup>

But section 37 enables any person not having a right of entry on the 31st December, 1834, to bring any real or mixed action, to which he was then entitled, at any time before the 1st June, 1835.

And section 38 further provides, that when on the 1st day of June, 1835, any person whose right of entry shall have been taken away by any descent, cast, discontinuance, or warranty, might maintain any real action, he may maintain the same after the 1st day of June, 1835, *but only within the period during which he might under the Act have made an entry, if his right of entry had not been so taken away.*<sup>1</sup>

And by section 39, no descent, cast, discontinuance, or warranty shall, after the 31st December, 1833, toll or defeat any right of entry or action for the recovery of land.

Section 40 enacts that *money secured by mortgage, judgment, or lien or otherwise, charged upon or payable out of any land or rent at law or in equity or any legacy,*<sup>2</sup> shall not be recovered but within twenty years next after a present right shall have accrued to some person capable of giving a discharge for or releasing the same, unless there have been part payment

<sup>1</sup> See *Doe d. Gilbert v. Ross*, 7 M. & W. 102.

<sup>2</sup> Independently of this Act, long acquiescence on the part of a legatee will bar his claim against an executor, against whom a case of nonfeasance only has been made out. *Portlock v. Gardner*, Vice-Chancellor Wigram's Court (June, 1842), *Jurist*, 795.



in the mean time of principal or interest, or an acknowledgment in writing have been given, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto, or his agent, in which case the time runs from such payment or acknowledgment, or the last of them, if more than one.

Section 41 enacts, that no arrears of dower, or any damages on account of such arrears, shall be recovered but within six years before commencement of action or suit.

Section 42 enacts, that no arrears of rent, or of interest in respect of any money charged upon any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered but within six years next after the same became due, or next after an acknowledgment of the same in writing shall have been given to [\* xxiv] the person entitled thereto, \* or his agent, signed by the person by whom the same was payable, or his agent, *except* where any prior mortgagee or incumbrancer shall have been in possession of the land mortgaged, or profits thereof, within one year next before any action or suit by a subsequent mortgagee or incumbrancer of the same land; in which case such subsequent mortgagee or incumbrancer may in such action or suit recover all arrears of interest which shall have become due during the time that the prior mortgagee or incumbrancer was in possession of the land or profits thereof.<sup>1</sup>

Section 43 extends the act to the spiritual courts.

Section 44 enacts, that the act shall not extend to Scotland, and that it shall not, so far as it relates to advowsons, extend to Ireland.

At common law there was no time limited within which it was necessary to bring actions for the recovery of realty, but by the statute 32 Hen. VIII., c. 2, a writ of right was limited to sixty years next before the claim made. Actions upon the possession of the ancestor of the claimant, and formedons in remainder or reversion, were limited to fifty years; and actions upon the seisin or possession of the party himself to thirty years. And by the 21 Jas. I., c. 16, it was enacted, that no person should at any time make *an entry* into any lands, tenements, or hereditaments, but within twenty years next after his title should *first descend* or accrue; and that statute limited the period of all writs of formedon to twenty years.

By the 4 Hen. VII., c. 24, a fine with proclamations bars all persons having *present rights of entry*, and not being under disabilities, after five years

<sup>1</sup> Section 3 of the 8 & 4 Will. IV., c. 42, *post*, excepts the matters to which it applies, out of the above section; arrears of rent due on an indenture are, therefore, not barred for twenty years, the six years above mentioned being confined to arrears of rent due on demises not under seal. *Paget v. Foley*, 8 Scott, 120; *s. c.* 2 Bing. N. C. 679; *Strachan v. Thomas*, 4 P. & D. 229.

from the last proclamation; all persons under disabilities, if they did not claim within five years after their disabilities were removed; and all persons not having *present* rights, if they did not claim within five years after they obtained a present right of entry, under their disabilities, and then within five years after the removal of their disabilities. And by 4 & 5 Anne, c. 16, § 16, no claim or entry to avoid a fine with proclamations is sufficient, unless upon such entry or claim an action be commenced within one year after, and prosecuted with effect.<sup>1</sup> All real and mixed actions, *except dower, right of dower, quare impedit, and ejectment*, being now abolished by 3 and 4 Will. IV., c. 27, § 37, and fines being also abolished by the 3 and 4 Will. IV., c. 74, it becomes unnecessary to touch more fully upon the old statutes of limitations, \* in reference to realty. [\* xxv] I may, however, mention, that the right of entry of a person out of possession was not barred by the statute 21 Jas. I., c. 16, unless the possession of the party in possession was *adverse* to the party having the right of entry. And as it was held under that act that mere non-payment of rent did not alone render the possession adverse, and also that there could be no adverse possession where the party in possession held the estate by the permission of the real owner, or under an implied tenancy, or where the possession was consistent with that of the party entitled, questions frequently arose under that Act, whether the possession was adverse or not. And it commonly happened, that a party having been in possession for a great length of time, was ultimately dispossessed, because it was found that his possession was by the implied license of the party claiming, and consequently not adverse to him. The object of the late statute, 3 & 4 Will. IV., c. 27, appears to have been to alter this state of things, and to render any possession adverse (where the party claiming has a present right of possession, and is not under disability), unless, *first there be a payment of rent or second, an acknowledgment in writing*; and this object has been fully carried out, as that statute (3 & 4 Will. IV., c. 27) has been held to have entirely got rid of the doctrine of non-adverse possession, any possession for twenty years, whatever be the nature of the possession, being now (where the party in possession has neither paid rent, nor given an acknowledgment in writing) a bar under that statute, provided the party claiming had a present right of entry, and was not under any of the disabilities mentioned in the Act, and not entitled to a further claim as a reversioner. Thus, in the case of *Nepean, Bart. v. Doe d. Knight*,<sup>2</sup> Lord

<sup>1</sup> As to what is a sufficient freehold to support a fine, see *Doe d. Blight v. Pett*, 4 P. & D. 278; s. c. 11 A. & E. 842; and *Davies v. Lowndes*, 2 Scott, 71; 3 Scott, 885; 7 Scott, 21; and 1 Scott, N. R. 328; 1 M. & G. 478.

<sup>2</sup> 2 M. & W. 895, decided on error on the Exchequer Chamber (Tri. 1887). See, too, *Doe d. Bennett v. Long*, 9 C. & P. 778.

Denman, in delivering judgment, observes:<sup>1</sup> “ We are clearly of opinion that the second and third sections of that Act (which came into operation on the first of January, 1834) have done away with the doctrine of non-adverse possession, and, except in cases falling within the fifteenth section of the Act, the question is whether twenty years have elapsed *since the right accrued, whatever be the nature of the possession.*” The fifteenth section, be it remembered, gives five years to a party to institute his claim, when possession was not adverse at *the time* of passing the Act; and it only applied where the possession was not adverse at the time of passing the Act, according to the former state of the law;<sup>2</sup> and, as the five years have now elapsed, no question can arise under it. The object [\* xxvi] \* of the Act, viz., to abolish the doctrine of non-adverse possession, has been further confirmed in the still later case of *Cully v. Doe d. Taylerson*.<sup>3</sup> In that case, it was held that the effect of section 2 of the 3 & 4 Will. IV., c. 27, “is to put an end to all questions and discussions whether the possession of lands, &c., be adverse or not; and if one party has been in the actual possession for twenty years, *whether adversely or not*, the claimant whose original right of entry accrued above twenty years before bringing the ejectment is barred by this section.” The same case decides that the twelfth section has relation back, so as to make the possession of one joint-tenant, &c., in possession of the entirety adverse to his cotenant, though such possession were prior to the act; and that consequently a joint-tenant coparcener, or tenant in common, who has been out of possession twenty years, is barred by the second and twelfth sections taken together, notwithstanding that part of the twenty years was before the passing of the Act.<sup>4</sup> The above case of *Nepean, Bart. v. Doe d. Knight*, too, decides that where a party has been absent seven years, without having been heard of, the presumption of the law then is that he is dead, but there is no legal presumption as to the *time* of his death; a party, therefore, who claims as a reversioner, cannot avail himself of this presumption, to establish that the tenant for life died within twenty years from the commencement of the action, but must prove positively that he did die within that time.<sup>5</sup>

<sup>1</sup> 2 M. & W. 911.

<sup>2</sup> *Nepean v. Doe d. Knight*, 2 M. & W. 911. And see also as to what possession is adverse, *Doe v. Brunson*, 4 N. & M. 664; s. c. 8 A. & E. 68; *Doe d. Parker v. Gregory*, 4 N. & M. 308; s. c. 2 A. & E. 14; *Doe d. Pritchard v. Jauncey*, 8 C. & P. 99; and *Rex v. Inhabitants of Axbridge*, 4 N. & M. 477; s. c. 2 A. & E. 520.

<sup>3</sup> 3 P. & D. 539 (decided 12th May, 1840). The above are Denman's, Ch. J., words in delivering the judgment of the court, see p. 548, at the bottom. See, too, *Doe d. Curzon v. Edmonds*, 6 M. & W. 295.

<sup>4</sup> See 3 P. & D. 550, same case.

<sup>5</sup> *Nepean, Bart. v. Doe d. Knight*, 2 M. & W. 895.

It will be observed that the 3 & 4 Will. IV., c. 27, differs from the former statutes of limitations, as they were held not to extinguish or bar the right, but merely the remedy;<sup>1</sup> the 34th section of the above Act, however, enacts, that "at the end of the time limited by that Act, *the right and title to the land, &c., shall be extinguished.*"<sup>2</sup> A question may arise under this enactment, on the 14th section of the Act (which makes an acknowledgment of title in writing by the party in possession sufficient to prevent the statute running, except from the time when such acknowledgment is given), as it may be reasonably contended, that, when once the right of a party out of possession is barred by effluxion of time, the acknowledgment mentioned in the 14th section can be of no avail, because the title being absolutely *extinguished* by the 34th section, there is no title existing to be acknowledged; besides, the title being extinguished, the party in whom it was vested prior to the bar being complete is as much a stranger to the title and land as any indifferent person; and, therefore, if it were holden that an acknowledgment \* after that time revests the title [\* xxvii] in the former owner, it must follow that by such an acknowledgment the land or title might be vested in an indifferent person, which would be to give to this acknowledgment all the effect of a feoffment at common law, or a lease and release under the statute of uses. The object of the statute seems to have been to make this acknowledgment sufficient to prevent the operation of the Act, if given before the bar is complete, but not, I conceive, to make it sufficient to re-create a title absolutely extinguished by the 34th section. There appears to be no decision upon the point, and I have not seen the distinction taken, I therefore throw it out for consideration. In the case of *Doe d. Curzon v. Edmonds*,<sup>3</sup> in which an acknowledgment was set up, the acknowledgment was given before the bar was complete, and was held insufficient, from not being sufficiently final in its terms, the point therefore did not arise. That case, however, decides that it is a question for the judge, and not for the jury, whether or not a writing amounts to a sufficient acknowledgment of title, within the 3 & 4 W. IV., c. 27, § 14.<sup>4</sup> And it seems that the acknowledgment must be final and conclusive in its terms, or it will not bar the operation of the statute. A mere proposal to accept a lease (the bargain having subsequently gone off) was held insufficient, and the court observed, "that it was no acknowledgment of title, because there was no final bargain." The proposal was in the following terms: "Although, if matters were contested, I am of opinion that I should establish a legal right to the premises, yet,

<sup>1</sup> 1 Saund. 288, a, note; 1 Black. 678.

<sup>2</sup> And in equity as well as at law, see section 24.

<sup>3</sup> 6 M. & W. 295.

<sup>4</sup> *Doe d. Curzon and Others v. Edmonds*, 6 M. & W. 295. See, too, *Morell v. Frith*, 3 M. & W. 402. See *post*, what acknowledgment sufficient to take the case out of the 21 Jas. I. c. 16.

under all circumstances, I have made up my mind to accede to the proposal you made, of paying a moderate rent on an agreement for a term of twenty years.”<sup>1</sup>

As to what amounts to a sufficient acknowledgment, see *Fursdon v. Clogg*, 10 M. & W. 572.

A *parol* acknowledgment by a tenant of having paid rent, is sufficient evidence of the payment thereof within the 3 & 4 Will. IV., c. 27. 7 Jurist, 532 (Easter, 1848). See *post*, pp. 89, 90, 91.

It will be noticed that reversioners and remainder-men have (by sections 4 and 5) two periods when they may enforce their claims, either 1st, in case of a forfeiture, when the forfeiture takes place; or, 2d, at the time when the reversion becomes an estate in possession.<sup>2</sup> And by the 6th section the statute runs on, notwithstanding the death of a party and there being no administrator, as, for the purposes of the Act, the administrator must claim as if there had been no interval between the grant of the letters of administration and the death of the deceased. Before this enactment, in cases of intestacy, the statutes of limitations only [\* xxviii] run as to the rights occurring *after* \* the death of the intestate from the grant of the administration. This enactment is confined to the *purposes of this Act*, and therefore only alters the law to that extent, and not generally.

The statute (section 16) contains the usual provision relative to the disability of infancy, lunacy, coverture, or living beyond seas, giving ten years from the removal of the disability; but, in analogy with the construction of the 21 Jas. I., it provides, that no further time shall be allowed for a succession of disabilities, and that no claim shall in any case be enforced but within forty years from the time when it first accrued, even though there be continued disabilities during the whole of the forty years.

The 28th section (which enacts, that possession by the mortgagee for twenty years shall bar the mortgagor, unless there be an acknowledgment in writing of the mortgagor's title) has been explained by the 7 Will. IV. and 1 Vict., c. 28, which, reciting that doubts had arisen on the subject, enacts, that a mortgagor may recover the mortgaged land at any time within twenty years after the last payment of principal or interest, though his right of entry accrued more than twenty years ago. The statute runs in general from the date of the mortgage, and not from the time when default made, even though there be a covenant that the mortgagee may quietly enjoy *after* default, as the land passes by the mortgage, and the mortgagee

<sup>1</sup> *Doe d. Curzon and Others v. Edmonds*, 6 M. & W. 295. See, too, *Morell v. Frith*, 8 M. & W. 402. See *post*, what acknowledgment sufficient to take the case out of the 21 Jas. I. c. 16.

<sup>2</sup> A lessor, where there is a lease, is a remainder-man within this section. 7 M. & W. 181.

has therefore a right of entry from the date ; if, however, there is a proviso that the mortgagor shall retain possession until default, the rule would of course be otherwise.<sup>1</sup>

The statute appears sufficiently precise as to the period from which the limitation shall begin to run in the case of a tenancy at will, namely, from the determination of the tenancy ; and it enacts, section 7, that the tenancy at will shall be deemed to have determined (in case, of course, of there being no payment of rent, or acknowledgment in writing, or prior determination) at the expiration of *one year after the commencement of such tenancy*. It has been decided that the tenancy at will or sufferance must be deemed to have terminated at all events at the end of the first year, unless otherwise determined before that period.<sup>2</sup> And it would seem to be clear, from the statute, that, at the end of twenty years from that time, that is, at the end of twenty-one years from the commencement of the tenancy at will, the statute would be a complete bar, unless the party claiming could prove either a payment of rent, or an acknowledgment in *writing*. Some question has, however, been raised upon the right construction of this section, by decisions relative to tenancies at will. Thus, it has been held in two cases, that a purchaser either let into, or who takes possession under a contract of purchase, and who is strictly a tenant at will,<sup>3</sup> has, and can gain, no adverse \* title against the vendor ;<sup>4</sup> though in a [\* xxix] later case<sup>5</sup> (in which, however, these cases were not alluded to), where the judge ruled to the contrary, such ruling was held proper on motion for a new trial. And, in a recent case,<sup>6</sup> where A, in 1817, let B into possession of lands, as tenant at will, and, in 1827, A entered upon the land without B's consent, and cut and carried away stone therefrom ; held, on error in the Exchequer Chamber, that this entry amounted to a determination of the estate at will, and that B thenceforth became tenant at sufferance, until by agreement, expressed or implied, a new tenancy was created between the parties, and, therefore, that unless the fact of such new tenancy was found by the jury, an ejectment brought in 1839 was too late, inasmuch as by the statute 3 & 4 Will. IV., c. 22, § 7, his right of action first accrued at the expiration of one year after the commencement of the original tenancy at will, that is, in the year 1818.<sup>7</sup> This case decides

<sup>1</sup> Doe d. Roylance v. Lightfoot, 8 M. & W. 553.

<sup>2</sup> Doe d. Bennett v. Turner, 7 M. & W. 226 ; 9 M. & W. 643.

<sup>3</sup> Doe d. Stanway v. Rock, C. P. 20 Law J. 194 (E. 1842) ; Doe d. Bennett v. Turner, 7 M. & W. 226 ; 9 M. & W. 643.

<sup>4</sup> Doe d. Milburn v. Edgar, 2 Scott, 732 ; 2 Bing. N. C. 391 ; Doe d. Counsell v. Caperton, 9 C. & P. 112.

<sup>5</sup> Doe d. Stanway v. Rock, C. P. 20 Law J. 194 (E. 1842.)

<sup>6</sup> Doe d. Bennett v. Turner, 7 M. & W. 226 ; and in error in the Exchequer Chamber, 9 M. & W. 643 (Hil. 1842).

<sup>7</sup> Ibid.



that a tenancy at will, or sufferance, must under the statute be held to have determined at the end of one year after the commencement of such tenancy, if there was no prior determination thereof; but it also decides, *that if the jury find<sup>1</sup> that a new tenancy was created (even by parol), at any time within twenty years* next before bringing the action, then that the statute runs from such tenancy, and not from the first year after the commencement of the original tenancy. The effect of this latter ruling appears to be *to introduce in effect, an acknowledgment by parol* as sufficient to prevent the bar of the statute, for what is a parol agreement for a new tenancy, but an acknowledgment by parol; if this decision be supported, the effect must be to introduce all the inconvenience attending the ancient doctrine of non-adverse possession, which, according to *Nepean Bart v. Doe d. Knight*, and *Cully v. Doe d. Taylerson*, it was the intention of the statute to abolish, those cases expressly deciding, “that the question is, whether twenty years have elapsed since the right accrued, whatever be the nature of the possession;” and that the effect of the Act is, “*to put an end to all questions and discussions whether the possession of lands, &c., be adverse or not, and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred.*” Now, it is clear, that as a tenancy at will and sufferance, and a tenancy from year to year *without lease* by sections 7 and 8, at all events determine at the end of the first year;<sup>2</sup> [\* xxx] the right of \* entry of the lessor then first accrues, nor has he any further right as a remainder-man by virtue of clause five, as the tenancy itself then determines, and his right becomes a right in possession. How then can it be said that it is a question for the jury (as was laid down in *Doe d. Bennett v. Turner*<sup>3</sup>) whether there has been any subsequent agreement (by parol) for a new tenancy, and that (in the event of the jury finding that there was such new tenancy) the statute only runs from such new tenancy, and not from the end of the first year, after the commencement of the tenancy at will. The statute only mentions two matters which will defeat the twenty years’ bar: 1st, payment of rent; 2d, an acknowledgment in writing; and apparently carefully excludes all other kinds of evidence by expressly enacting (sections 10 and 11) that a mere entry shall not be deemed possession, and that no right shall be preserved by continual or other claim upon or near the land. From whence, then, is drawn the doctrine laid down in these cases,<sup>4</sup> that a party may be in

<sup>1</sup> And the same doctrine is supported by *Doe d. Stanway v. Rock*, C. P. 20 Law J. 194.

<sup>2</sup> *Doe d. Bennett v. Turner*, 7 M. & W. 226; 9 M. & W. 643.

<sup>3</sup> 7 M. & W. 226; and on error, 9 M. & W. 643.

<sup>4</sup> *Doe d. Milburn v. Edgar*, 2 Scott, 782; 2 Bing. N. C. 391; *Doe d. Counsell v. Caperton*, 9 C. & P. 112; *Doe d. Bennett v. Turner*, 7 M. & W. 226; and on error, 9 M. & W. 643; and *Doe d. Stanway v. Rock*, C. P. 20 Law J. 194.



possession as tenant at will more than twenty-one years without either payment of rent or acknowledgment *in writing*, and yet acquire no title under the Act? If it is a question for a jury in one case under the statute, namely, in that of a tenancy at will, whether the possession is adverse, why not in all cases; and what then becomes of the requirements of the statute, as to either payment of rent or an acknowledgment in writing, and the principles laid down in *Nepean, Bart v. Doe d. Knight*,<sup>1</sup> and *Culley v. Doe d. Taylerson*?<sup>2</sup>

The statute 3 & 4 Will. IV., c. 27, does not apply to give a title where the party claiming had quitted possession before the passing of the Act. Thus, where a party was let into possession of land, in 1807, as tenant at will, and continued in possession till 1831, without making any acknowledgment of tenancy or paying rent, and then quitted possession; held, that he had acquired no right in the land, so as to enable his heir at law to maintain ejectment under the 3 & 4 Will. IV., c. 27, even against a stranger; because, as he had quitted the possession before the Act passed, his case was not within it. Patteson, J., observed, the case would have been quite different, if the tenant at will had continued in possession. But here, after the possession had been long determined, it is contended that a fee-simple arises by the passing of the Act. That cannot be.<sup>3</sup>

Where there is an estate tail, and the tenant in tail bars the remainders \* over, and creates out of his estate tail new estates, [\* xxxi] the parties who take such estates have the same time which the tenant in tail had within which to bring an ejectment.<sup>4</sup> Thus, where estates settled to the wife for life, remainder to her issue in tail, and in 1818, the husband, wife, and R. G., the only son, by deed and a recovery, limited the same estates to the husband for life, remainder to the wife for life, remainder to R. G., the son, for life, remainder to his issue in tail, remainder to J. F., his sister, for life, with remainders over; the husband died in 1819, the wife in 1822, and R. G. in 1828; it was held, that, as the estate of J. F. was raised out of the estate tail of R. G., she had the same period for bringing an ejectment in respect of any of the estates comprised in the above deeds as R. G. would have had, had he remained alive, namely, twenty years from 1822, when his remainder came in possession.<sup>4</sup>

Where premises are in lease, the lessor is a reversioner within the latter part of the 3d section; and, therefore, if he simply discontinue the receipt of the rent for more than twenty years, he is not barred, but may recover the premises at any time within twenty years from the determination of the lease; if, however, the rents were received *adversely by a third party*,

<sup>1</sup> 2 M. & W. 911.

<sup>2</sup> 3 P. & D. 539.

<sup>3</sup> *Doe d. Thompson v. Thompson*, 2 N. & P. 656; s. c. 6 A. & E. 721.

<sup>4</sup> *Doe d. Curzon and Others v. Edmonds*, 6 M. & W. 295.

then no such right accrues on the determination of the lease.<sup>1</sup> And by simply discontinuing the receipt of rent for more than twenty years, the lessor does not forfeit his right to the arrears of rent, as the second section does not apply to rent on a demise, but the lessor may recover twenty years' arrears, or six years' arrears according to the nature of the demise, namely, whether under seal or by parol.<sup>2</sup>

Where a person is entitled, under a will, to an annuity charged upon land, his right is barred under the second section of the 3 & 4 Will. IV. c. 27, though he has never received any part of the annuity, at the end of twenty years from the time when his right to make a distress first accrued; for though the third section of the Act excepts the case of a will, in mentioning the periods from which the statute shall be deemed to run, yet the second section of the Act is not governed and controlled by the third, but simply explained and construed; the object of that section being to explain and give a construction to the enactment contained in the second clause, as to the time at which the right to make a distress for any rent shall be deemed to have accrued, in those cases only in which doubt or difficulty might occur, leaving every case which plainly falls within the general words [\* xxxii] of the \* second section, but is not included amongst the instances given by the third, to be governed by the operation of the second.<sup>3</sup>

It is no answer to a *prima facie* title of twenty years' possession, that such possession was in continuation of that of a sister, who died more than twenty years before action, and who entered by abatement into the land to which her elder brother (whose issue was alive) was entitled as heir, and held, that the onus of explaining the character of the possession is upon the agent, against whom the presumption from possession arises.<sup>4</sup>

The statute of limitations bars the lord of the manor from entering for a forfeiture after twenty years.<sup>5</sup>

When a lease is granted to a woman living apart from her husband, possession adverse to her is also adverse to him.<sup>6</sup>

The king can never, in point of law, be put out of possession by the wrongful entry of a subject, yet there may be an adverse possession in fact against the crown. After such a possession of twenty years, ejectment

<sup>1</sup> Doe d. Davey v. Oxenham, 7 M. & W. 181. This case does not, of course, apply to a tenancy at will, or from year to year, so as to give the lessor any other right than from the end of the first year.

<sup>2</sup> Grant v. Ellis, 9 M. & W. 113.

<sup>3</sup> James v. Salter, 4 Scott, 168; s. c. 3 Bing. N. C. 544 (Hil. 1837). The intimation thrown out on the motion for a new trial, in the case reported (2 Scott, 750; 2 Bing. N. C. 505), that the 2d section was controlled by the 3d, was expressly abandoned. See Tindal's (Ch. J.) observations.

<sup>4</sup> Doe d. Draper v. Lawley, 2 N. & M. 381.

<sup>5</sup> Whitton v. Peacock, 3 Mylne & K. 325.

<sup>6</sup> Doe d. Wilkins v. Wilkins, 5 N. & M. 434; s. c. 4 A. & E. 86.

will not lie by the grantee of the crown, as the crown could only recover the land by an information of intrusion.<sup>1</sup>

Where a party claiming land enters, and obtains from the tenants payment of a shilling, and their signature to an instrument acknowledging his title ; held, that it is an attornment, and does not require a stamp, and that it is an act of ownership, and strong evidence of ownership, at the time of the attornment against future occupiers, though they did not claim through the parties who attorned.<sup>2</sup>

A party in possession, dealing with property as his own, was evidence of adverse possession, under the 21 Jas. I.<sup>3</sup>

A replication of a life-estate, under the 3 & 4 Will. IV., c. 71, must show that the plaintiff is the person entitled to the reversion expectant thereon.<sup>4</sup>

<sup>1</sup> Doe d. Watt v. Morris, 2 Scott, 276 ; s. c. Bing. N. C. 189 (Trin. 1835).

<sup>2</sup> Doe d. Linsey v. Edwards, 6 N. & M. 633 ; s. c. 5 A. & E. 95. This case was before the 3 & 4 Will. IV. c. 27, nothing, therefore, turned upon that Act.

<sup>3</sup> Ibid.

<sup>4</sup> Wright v. Williams, 1 M. & W. 77.

# LIMITATION OF ACTIONS IN THE UNITED STATES.

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## NEW ENGLAND STATES.

### MAINE.

#### *Personal Actions. (Revised Statutes, Ch. 146.)*

[\* xxxiii] \* SECTION 1. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards, namely: —

*First.* All actions of debt, founded upon any contract or liability not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of this, or some other of the United States, or of some justice of the peace in this State.

*Second.* All actions upon judgments, rendered in any court, not being a court of record, except justices of the peace in this State.

*Third.* All actions for arrears of rent.

*Fourth.* All actions of assumpsit, or upon the case, founded on any contract or liability, expressed or implied.

*Fifth.* All actions for waste, and all actions of trespass on land, and all actions of trespass, except those of trespass for assault, battery, and false imprisonment.

*Sixth.* All actions of replevin, and other actions for taking, detaining, or injuring goods or chattels.

*Seventh.* All other actions on the case, except actions for slanderous words, and for libels.

SECT. 2. All actions against a sheriff, except for escape of prisoners committed on execution, for the negligence or misconduct of his deputies, shall be commenced within four years next after the cause of the action shall accrue.

SECT. 3. All actions of assault and battery and for false imprisonment, and all actions for slanderous words and for libels, shall be commenced within two years next after the cause of action shall accrue.

SECT. 4. All actions for the escape of prisoners committed on execution shall be actions on the case, and shall be commenced within one year after the cause of action shall accrue.

\* SECT. 5. No *scire facias* shall be served on bail, unless within [\* xxxiv] one year next after judgment rendered against the principal.

SECT. 6. All actions against an indorser of a writ must be commenced within one year next after judgment entered in the original action.

SECT. 7. None of the foregoing provisions shall apply to any action brought upon a promissory note, which is signed in the presence of an attesting witness, nor to an action brought upon any bills, notes, or other evidences of debt, issued by any bank.

SECT. 8. Nor shall any of the provisions in this chapter be construed to apply to any case or suit, which, by any particular statute, is limited to be commenced within a different specified time, but such suits may be commenced within such time.

SECT. 9. In all actions of debt or assumpsit, brought to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

SECT. 10. If any person, entitled to bring any of the before-mentioned actions, shall, at the time when the cause of action accrues, be within the age of twenty-one years, a married woman, insane, imprisoned, or without the limits of the United States, such person may bring the actions within the times in this chapter respectively limited, after the disability shall be removed.

SECT. 11. All personal actions on any contract, not limited by any of the foregoing sections, or any other law of the State, shall be brought within twenty years after the accruing of the cause of action.

SECT. 12. When a writ shall fail of a sufficient service or return by any unavoidable accident, or by the default or negligence of any officer, to whom it was delivered or directed; or, when such writ shall be abated, or the action otherwise avoided and defeated, for any matter of form, or by the death of either party; or, if a judgment for the plaintiff shall be reversed on a writ of error; in such cases, the plaintiff may commence a new action, on the same demand, within six months after the abatement or determination of the original suit, or reversal of the judgment in the same; and, if the cause of action by law survives, his executor or administrator, in case of his death, may commence such new action, within said six months.

SECT. 13. If any person, entitled to bring any of the actions before mentioned, or liable to any such action, shall die before the expiration of the time herein limited therefor, or within thirty days after the expiration of said term, and, if the cause of action survives by law, the action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time within two years after administration or letters testamentary granted, and not afterwards if barred by this chapter.

[\* xxxv] \* SECT. 14. If any person shall be disabled to prosecute an action in this State, by reason of his being an alien, subject, or citizen of any country at war with the United States, the time of continuance of such war shall not be deemed any part of the respective periods herein limited for the commencement of any of the before-mentioned actions.

SECT. 15. All actions and suits for any penalty or forfeiture on any penal statute, brought by any person, to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year next after the offence was committed, and not afterwards.

SECT. 16. If not so prosecuted by any individual, a prosecution by suit, indictment, or information may be commenced therefor, in the name and for the use of the State, at any time within two years next after the offence was committed, and not afterwards.

SECT. 17. The time when a writ is actually made, with an intention of service, shall be deemed the commencement of a suit in respect to the limitations of this chapter.

SECT. 18. If any person, liable to any of the actions mentioned in this chapter shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, or, if a fraud shall be committed, which entitles any person to an action, in either case, the action may be commenced at any time within six years after the person entitled thereto shall discover that he has just cause of action, but not afterwards.

SECT. 19. In actions of debt or upon the case, founded upon any contract, no acknowledgment or promise shall be allowed, as evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be an express one, and made or contained in some writing, signed by the party chargeable thereby.

SECT. 20. If there are two or more joint contractors, no such contractor, executor, or administrator shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any acknowledgment or promise, made or signed by any other or others of them.

SECT. 21. In actions, commenced against two or more joint contractors, if it shall appear on trial, or otherwise, that the plaintiff is barred by the provisions of this chapter, as to one or more of the defendants, but is entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be rendered for the plaintiff, as to any of the defendants against whom he has a right to recover, and for the other defendant or defendants against the plaintiff.

SECT. 22. If, in any action on contract, the defendant shall plead in abatement, that any other person ought to have been jointly sued, and issue be joined on that plea, and if it shall appear, on the trial, that the

action was, by reason of the provisions of this chapter, barred against \* the person so named in the plea, the said issue shall be [\* xxxvi] found for the plaintiff.

SECT. 23. Nothing contained in the preceding four sections shall alter, take away, or lessen the effect of payment of any principal or interest, made by any person; but no indorsement or memorandum of any such payment, written or made on any promissory note, bill of exchange, or other writing, by or on behalf of the party, to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of payment, so as to take the case out of the operation of the provisions of this chapter.

SECT. 24. If there are two or more joint contractors, or joint executors or administrators of any contractors, no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any payment, made by any other or others of them.

SECT. 25. Every judgment and decree of any court of record of the United States, or of this or any other State, or of a justice of the peace in this State, shall be presumed to be paid and<sup>1</sup> satisfied, at the expiration of twenty years after any duty or obligation accrued by virtue of such judgment or decree, to do or perform the matter or thing therein required.

SECT. 26. All the provisions of this chapter shall apply to the case of debt or contract, alleged or filed by way of set-off, on the part of the defendant; and the time of such limitations of such debt or contract shall be computed in like manner as if an action had been commenced therefor, at the time when the plaintiff's action was commenced, unless the defendant be deprived of the benefit of the set-off, by the nonsuit or other act of the plaintiff; and, when the party so filing the set-off is thus defeated of a judgment on the merits of such debt or contract, he may commence a new action thereon within the time limited, as provided in the twelfth section of this chapter, for bringing a new action for the reasons therein mentioned.

SECT. 27. None of the provisions of this chapter, respecting the acknowledgment of a debt, or a new promise to pay it, shall apply to any such acknowledgment or promise, made before this chapter shall take effect as law; but every such last-mentioned acknowledgment or promise, though not in writing, shall have the same effect, as if no provision relating thereto had been made, as contained in this chapter.

SECT. 28. If, at the time when any cause of action, mentioned in this chapter, shall accrue against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into the State, and if, after any cause of action shall have accrued, the person against whom it shall have accrued shall be absent from and reside without the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.



[\* xxxvii] \* SECT. 29. No executor or administrator after having given bond and notice of his appointment, as provided in chapter one hundred and twenty, shall be held to answer to the suit of any creditor of the deceased, unless it shall be commenced within four years from the time of his giving bond as aforesaid; excepting in the cases mentioned in said one hundred and twentieth chapter, where the provisions are distinctly stated.

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*Real Actions. (Revised Statutes, Ch. 147.)*

SECTION 1. No person shall commence any real or mixed action for the recovery of lands, or make an entry thereon, unless within twenty years after the right to make such entry, or bring such action, first accrued: or within twenty years after he, or those under or from whom he claims, shall have been seised or possessed of the premises; except as hereinafter provided.

SECT. 2. If such right or title first accrued to an ancestor or predecessor of the person who brings the action or makes the entry, or to any other person, from, by, or under whom he claims, the said twenty years shall be computed from the time when the right or title so first accrued to such ancestor, predecessor, or other person.

SECT. 3. In the construction of this chapter, the right of entry, or of action to recover land, shall be deemed to have first accrued at the respective times hereinafter mentioned: —

*First.* When a person shall be disseised, his right of entry shall be deemed to have accrued at the time of such disseisin.

*Second.* When he claims as heir or devisee of one who died seised, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy by the curtesy or other estate, intervening after the death of such ancestor or devisor; in which case, his right shall be deemed to accrue when such intermediate estate shall expire, or when it would have expired by its own limitation.

*Third.* When there is such an intermediate estate, and, in all cases, when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate estate would have expired by its own limitation, notwithstanding any forfeiture thereof, for which he might have entered at an earlier time.

SECT. 4. The preceding clause shall not prevent any person from entering, when entitled to do so, by reason of any forfeiture or breach of condition; but, if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred or the condition broken.

SECT. 5. In all cases not specially provided for, the right of entry shall be deemed to have accrued when the claimant, or the person under whom \* he claims, first became entitled to the possession [\* xxxviii] of the premises under the title upon which the entry or action is founded.

SECT. 6. If any minister or other sole corporation shall be disseised, any of his successors may enter upon the premises, or may bring an action for the recovery of them, at any time within five years after the death, resignation, or removal of the person disseised, notwithstanding the twenty years after the disseisin shall have expired.

SECT. 7. If, at the time when such right of entry, or of action upon or for any lands, shall first accrue, the person entitled to such entry or action, shall be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person, or any one claiming from, by, or under him, may make the entry, or bring the action, at any time within ten years after such disability shall be removed, notwithstanding the twenty years, before limited in that behalf, shall have expired.

SECT. 8. If the person first entitled to make such entry, or bring such action, shall die during the continuance of any of the disabilities mentioned in the preceding section, and no determination or judgment shall have been had of or upon the title, right, or action which accrued to him, the entry may be made, *on* [or] the action brought by his heirs, or any other person claiming from, by, or under him, at any time within ten years after his death, notwithstanding the said twenty years shall have elapsed; but no such further time for making such entry, or bringing such action, beyond what is herein before prescribed, shall be allowed, by reason of the disability of any other person.

SECT. 9. When a tenant in tail, or a remainder-man in tail, shall die, before the expiration of the period herein before limited for making any entry, or bringing an action for lands, no person claiming any estate, which such tenant in tail or remainder-man might have barred, shall make an entry, or bring an action, to recover such land, but within the period during which the tenant in tail, or remainder-man, if he had so long lived, might have made such entry, or brought such action.

SECT. 10. The limitations herein before prescribed, as to the time within which an action may be brought to recover any land, shall take effect from and after the first day of April, in the year one thousand eight hundred and forty-three; and if any person who shall then be entitled to bring any real action which is to be abolished after that day, as is mentioned in chapter one hundred and forty-five, shall then be within the age of twenty-one years, a married woman, insane, imprisoned, or without the limits of the United States, the action may be brought at any time within

five years after such disability shall cease, or after the death of the person so disabled: provided, that no such action shall be maintained after it would have been barred by the statutes of limitation in force, and immediately before the time when this chapter shall become a law.

SECT. 11. To constitute a disseisin, or such exclusive and [\* xxxix] adversary \*possession of lands, as to bar or limit the right of the true owner thereof to recover the same, it shall not be necessary that such lands shall be surrounded with fences, or rendered inaccessible by water; but it shall be sufficient, if the possession, occupation, and improvement are open and notorious, and comporting with the ordinary management of a farm; although that part of the same which composes the woodland belonging to such farm, and used therewith as a wood lot, shall not be enclosed as before mentioned.

SECT. 12. No real or mixed action, for the recovery of any lands, shall be commenced by or on behalf of the State, unless within twenty years from and after the day on which this chapter shall become a law, or within twenty years next after the time of the accruing of the title to the State.

SECT. 13. When any writ, in a real or mixed action, shall fail of sufficient service or return by an unavoidable cause, or by the default or negligence of any officer to whom it was delivered, or directed for service, or when such writ shall be abated, or the action otherwise avoided or defeated for any matter of form, or by the death or intermarriage or other disability of either party, accruing since the last continuance, or if a judgment for the demandant shall be reversed, on a writ of error, the demandant may commence a new action at any time within six months after abatement or determination of the first suit, or reversal of the judgment of the same.

SECT. 14. No person shall acquire any right or privilege of way, air, or light, or any other easement, from, in, upon, or over the land of another, by the adverse use and enjoyment thereof; unless such use shall have been continued uninterrupted for twenty years.

SECT. 15. The owner of the land, in such cases, for the purpose of preventing such right as is mentioned in the preceding section, may give notice in writing to the person claiming such right or privilege, of his intention to contest such right or easement; and such notice, being served and recorded, as hereinafter stated, shall be deemed an interruption of such use, and prevent the acquisition of a right thereto, by continuance of the use thereof for any length of time.

SECT. 16. Such notice may be given by an officer, as in civil actions, by his giving to such claimant, or his agent or guardian, if in the State, an attested copy of such writing, or by leaving the same at his dwelling-house; or, if not resident in the State, then a copy may be left with the tenant or occupant, if there be one, of the estate; and, if not, then such copy shall be affixed to the house or other conspicuous part of the premises; and the

return of the officer shall be made on the original writing, and the whole be recorded in the registry of deeds in the county, or registry district, within which such estate lies, within three months from the time of such service; and such notice may be given by the agent or guardian of the owner of the land.

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VERMONT.

*Criminal Prosecutions and Actions on Penal Statutes. (Revised Statutes, Ch. 57.)*

\* SECTION 1. All actions, suits, bills, complaints, informations, or [\* xl] indictments, for any crime or misdemeanor, other than theft, robbery, burglary, forgery, arson, and murder, shall be brought, had, commenced, or prosecuted within three years next after the offence was committed, and not after.

SECT. 2. All complaints and prosecutions for theft, robbery, burglary, and forgery shall be commenced and prosecuted within six years next after the commission of the offence, and not after.

SECT. 3. If any action, suit, bill, complaint, information, or indictment, for any crime or misdemeanor, other than arson and murder, shall be brought, had, commenced, or prosecuted after the time limited by the two preceding sections, such proceedings shall be void and of no effect.

SECT. 4. All actions and suits, upon any statute, for any penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, shall be commenced within one year after the offence was committed, and not after.

SECT. 5. If the penalty is given in whole or in part to the State, or to any county or town, or to the treasury thereof, a suit therefor may be commenced by or in behalf of the State, county, town, or treasury, at any time within two years after the offence was committed, and not afterwards.

SECT. 6. All actions, upon any statute, for any penalty or forfeiture, given in whole or in part to the party aggrieved, shall be commenced within four years after the offence was committed, and not after.

SECT. 7. The six preceding sections shall not apply to any bill, complaint, information, indictment, or action, which is or shall be limited by any statute, to be brought, had, commenced, or prosecuted within a shorter or longer time than is prescribed in these six sections; but such bill, complaint, information, indictment, or other suit shall be brought and prosecuted within the time that may be limited by such statute.

SECT. 8. When any bill, complaint, information, or indictment shall be exhibited in any of the cases mentioned in this chapter, the clerk of the

court, or magistrate, to whom it shall be exhibited, shall, at the time of exhibiting, make a minute thereon, in writing, under his official signature, of the true day, month, and year when the same was exhibited.

SECT. 9. When any action shall be commenced, in any of the cases mentioned in this chapter, the clerk or magistrate, signing the writ, [\* xli] shall \* enter upon it a true minute of the day, month, and year when the same was signed.

SECT. 10. Every bill, complaint, information, indictment, or writ, on which a minute of the day, month, and year shall not be made, as provided by the two preceding sections, shall, on motion, be dismissed.

SECT. 11. None of the provisions of this chapter shall apply to suits against moneyed corporations, or against the directors or stockholders thereof, to recover any penalty or forfeiture imposed, or to enforce any liability created by the act of incorporation or any other law; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created.

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*Real and Personal Actions and Rights of Entry. (Revised Statutes, Ch. 58.)*

SECTION 1. No action for the recovery of any lands, or for the recovery of the possession thereof, shall be maintained, unless such action is commenced within fifteen years next after the cause of action first accrued to the plaintiff, or those under whom he claims.

SECT. 2. No person having right or title of entry into houses or lands shall thereinto enter, but within fifteen years next after such right of entry shall accrue.

SECT. 3. The right of any person to the possession of any real estate shall not be impaired or affected by a descent being hereafter cast in consequence of the death of any person in possession of such estate.

SECT. 4. The first two sections of this chapter, so far as they relate to or affect lands granted, given, sequestered, or appropriated to any public, pious, or charitable use, shall take effect from and after the first day of January, in the year of our Lord eighteen hundred and forty-two, and, until that day, the laws now in force relating to such lands shall continue in operation.

SECT. 5. The following actions shall be commenced within six years next after the cause of action accrued, and not after:—

*First.* All actions of debt founded upon any contract, obligation, or liability, not under seal, excepting such as are brought upon the judgment

or decree of some court of record of the United States, or of this or some other State.

*Second.* All actions upon judgments rendered in any court not being a court of record.

*Third.* All actions of debt for arrearages of rent.

*Fourth.* All actions of account, assumpsit, or on the case, founded on any contract or liability, express or implied.

*Fifth.* All actions of trespass upon land.

\* *Sixth.* All actions of replevin, and all other actions for taking, [\* xlii] detaining, or injuring goods or chattels.

*Seventh.* All other actions on the case, except actions for slanderous words, and for libels.

SECT. 6. All actions for assault and battery, and for false imprisonment, shall be commenced within three years next after the cause of action shall accrue, and not afterwards.

SECT. 7. All actions for slanderous words, and for libels, shall be commenced within two years next after the cause of action shall accrue, and not after.

SECT. 8. All actions against sheriffs, for the misconduct or negligence of their deputies, shall be commenced within four years next after the cause of action shall accrue, and not afterwards.

SECT. 9. None of the foregoing provisions shall apply to any action brought upon a promissory note, which is signed in the presence of an attesting witness, but the action in such case shall be commenced within fourteen years next after the cause of action shall accrue thereon, and not afterwards.

SECT. 10. All actions of debt or *scire facias* on judgment shall be brought within eight years next after the rendition of such judgment, and all actions of debt on specialties within eight years after the cause of action accrued, and not afterwards.

SECT. 11. All actions of covenant, other than the covenants of warranty and seisin, contained in deeds of conveyance of lands, shall be brought within eight years next after the cause of action shall accrue, and not after.

SECT. 12. All actions of covenant, brought on any covenant of warranty, contained in any deed of conveyance of land, shall be brought within eight years next after there shall have been a final decision against the title of the covenantor in such deed; and all actions of covenant, brought on any covenant of seisin, contained in any such deed, shall be brought within fifteen years next after the cause of action shall accrue, and not after.

SECT. 13. When any person shall be disabled to prosecute an action in the courts of this State, by reason of his being an alien, subject or

citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods, herein limited for the commencement of any of the actions before mentioned.

SECT. 14. If, at the time when any cause of action of a personal nature, mentioned in this chapter, shall accrue against any person, he shall be out of the State, the action may be commenced, within the time herein limited therefor, after such person shall come into the State; and if, after any cause of action shall have accrued, and before the statute has run, the person against whom it has accrued shall be absent from and reside out of the State, and shall not have known property within this State, which [\* xliii] could, by \* the common and ordinary process of law, be attached, the time of his absence shall not be taken as any part of the time limited for the commencement of the action.

SECT. 15. If any person, entitled to bring any of the actions, before-mentioned in this chapter, or liable to any such action, shall die before the expiration of the time herein limited therefor, or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced, by the executor or administrator, within two years after such death, or against the administrator or executor of the deceased person, or the same may be presented to the commissioners on said estate, as the case may be, at any time within two years after the grant of letters testamentary or of administration, and not afterwards, if barred by the provisions of this chapter; provided, however, if the commissioners on such estate are required to make their report to the Probate Court before the expiration of said two years, the claim against the deceased shall be presented to the commissioners within the time allowed other creditors to present their claims.

SECT. 16. If, in any action duly commenced within the time in this chapter limited and allowed therefor, the writ shall fail of a sufficient service, or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ shall be abated, or the action otherwise defeated or avoided, by the death of any party thereto, or for any matter of form, or if, after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, or on exceptions, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and, if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year; or, if no executor or administrator be appointed within that time, then within one year after letters testamentary or of administration shall have been granted to him.



SECT. 17. Whenever the commencement of any suit shall be stayed by an injunction of any court of equity, the time during which such injunction shall be in force shall not be deemed any portion of the time in this chapter limited for the commencement of such suit.

SECT. 18. If any person, entitled to bring any action in this chapter specified, shall, at the time when the cause of action accrues, be a minor or a married woman, insane, or imprisoned, such person may bring the said action, within the times in this chapter respectively limited, after the disability shall be removed.

SECT. 19. None of the provisions of this chapter shall apply to suits, brought to enforce payment on bills, notes, or other evidences of debt, issued by moneyed corporations.

\* SECT. 20. All the provisions of this chapter shall apply to the [ \* xlv] case of a debt or contract, alleged by way of set-off; and the time of limitation of such debt shall be computed in like manner as if an action had been commenced therefor, at the time when the plaintiff's action was commenced.

SECT. 21. The limitations, herein before prescribed for the commencement of actions, shall apply to the same actions, when brought in the name of the State, or in the name of any officer, or otherwise, for the benefit of the State, in the same manner as to actions brought by citizens.

SECT. 22. In actions of debt, or upon the case, founded on any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party chargeable thereby.

SECT. 23. If there are two or more joint contractors, or joint executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any acknowledgment or promise, made or signed by any other or others of them.

SECT. 24. In actions commenced against two or more joint contractors, or joint executors or administrators of any contractor, if it shall appear on the trial, or otherwise, that the plaintiff is barred by the provisions of this chapter, as to one or more of the defendants, but is entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise or otherwise, judgment shall be given for the plaintiff, as to any of the defendants, against whom he is entitled to recover, and for the other defendant or defendants against the plaintiff.

SECT. 25. If, in any action on contract, the defendant shall plead in abatement, that any other person ought to have been jointly sued, and issue be joined on that plea, and it shall appear on the trial, that the action

was, by reason of the provisions of this chapter, barred against the person so named in the plea, the said issue shall be found for the plaintiff.

SECT. 26. Nothing contained in the four preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person.

SECT. 27. If there are two or more joint contractors or joint executors or administrators of any contractor, no one of them shall lose the benefits of the provisions of this chapter, so as to be chargeable by reason only of any payment, made by any other or others of them.

SECT. 28. None of the provisions of this chapter, respecting the acknowledgment of a debt, or a new promise to pay it, shall apply to any such acknowledgment or promise, made before the first day of January, in the year of our Lord eighteen hundred and forty-two, but every such last-mentioned acknowledgment or promise, although not made in writing, shall have the same effect as if no provisions, relating thereto, had been herein contained.

[\* xlv] \* SECT. 29. The provisions of this chapter which alter or vary the law now in force relative to the limitation of actions shall not apply to any case where the cause of action accrues before this chapter shall take effect and go into operation; and, in all cases where the cause of action accrues before this chapter takes effect, the laws now in force, limiting the time for the commencement of suits thereon, shall continue in operation.

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#### NEW HAMPSHIRE.

##### *Of Actions. (Revised Statutes, Ch. 180.)*

SECTION 1. All personal or transitory actions, where both parties are inhabitants of this State, may be commenced in the county where either of the parties to the writ may be an inhabitant, and not elsewhere.

SECT. 2. Actions of *scire facias*, upon any judgment or other proceeding before a justice, may be commenced in the Court of Common Pleas, where the amount of the judgment, or other demand claimed, including costs and interest, shall exceed thirteen dollars and thirty-three cents.

SECT. 3. An action of debt may be maintained, if commenced within six years, upon any judgment upon which an execution has been issued and returned satisfied, where it shall appear that the property levied or extended upon was not liable to be so levied or extended upon, for the amount equitably due, and costs of levying, and such levy shall not be a discharge of such debt for any purpose.

SECT. 4. Any copartner or joint-owner may maintain an action of *assumpsit* against one or more of his copartners or joint-owners, to recover

his just share of any goods or chattels, *choses in action*, or the proceeds thereof, received by such copartners or joint-owners, and not accounted for, delivered, paid, or otherwise settled for on demand.

SECT. 5. Any cotenant of real estate may recover by action of assumpsit, against one or more of his cotenants, his just share of the value of any trees destroyed, or cut or carried away by such cotenant, which were standing, lying, or growing on such real estate, or of any other property attached thereto and destroyed, severed, or carried away by such cotenant.

SECT. 6. If any cotenant of any real estate shall hold the exclusive possession and income thereof, against the will and without the consent of his cotenant, the cotenant so excluded may, in an action of assumpsit, recover \* of the person holding such possession, the full amount of [\* xlvii] all damages he may have sustained thereby.

SECT. 7. No action shall be maintained upon any contract of the sale of lands, unless the agreement upon which such action shall be brought, or some memorandum thereof, is in writing and signed by the parties to be charged therewith, or by some other person thereunto lawfully authorized by writing.

SECT. 8. No action shall be brought in the following cases:—

*First.* To charge any executor or administrator upon any special promise to answer damages out of his own estate;

*Second.* To charge any person upon any special promise to answer for the debt, default, or miscarriage of another person;

*Third.* To charge any person upon an agreement made upon consideration of marriage;

*Fourth.* To charge any person upon any agreement that is not to be performed within one year from the time of making it:

Unless such promise or agreement, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

SECT. 9. No action shall be brought upon any contract for the sale of any goods, wares, or merchandise for the price of thirty-three dollars or upwards, and no such contract shall be valid unless the buyer shall accept part of the property so sold and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

SECT. 10. No bill of exchange, negotiable promissory note, order, or draft, except such as are payable on demand, shall be payable until days of grace have been allowed thereon, unless it appear in the instrument that it was the intention of the parties that days of grace should not be allowed.

SECT. 11. If any person shall be compelled to pay any sum of money,

on account of the escape of any prisoner, he may maintain an action therefor against such prisoner and all persons aiding such escape.

SECT. 12. An action upon the case, and no other, shall be commenced against any sheriff, deputy sheriff, coroner, or other officer for any damages arising from any default or misconduct in his office.

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*Of Suits. (Revised Statutes, Ch. 181.)*

SECTION 1. No action for the recovery of any real estate shall be maintained, unless such action is brought within twenty years after [\* xlvii] the right \* first accrued to the plaintiff or to any person under whom he claims, to commence an action for the recovery thereof.

SECT. 2. If the person first entitled to maintain an action for the recovery of such real estate, was within the age of twenty-one years, a married woman, or insane, at the time such right accrued, such action may be commenced within five years after such disability is removed.

SECT. 3. Actions for words and for any assault, battery, wounding, or imprisonment, shall be brought within two years after the cause of action accrued, and not afterwards.

SECT. 4. All other personal actions shall be brought within six years after the cause of action accrued, and not afterwards.

SECT. 5. Actions of debt, founded upon any judgment or recognizance, or upon any contract under seal, may be brought within twenty years after the cause of action accrued, and not afterwards.

SECT. 6. Actions upon notes secured by mortgage may be brought so long as the plaintiff is entitled to commence any action upon the mortgage.

SECT. 7. Writs of error may be commenced within three years after judgment rendered, and not afterwards.

SECT. 8. Any infant, married woman, or insane person, may commence either of the personal actions aforesaid, within two years after such disability is removed.

SECT. 9. If the defendant, at the time of the cause of action accrued, or afterwards, was absent from and residing out of the State, the time of such absence shall be excluded in the computation of the several times before limited for the commencement of personal actions.

SECT. 10. If judgment shall be rendered against the plaintiff in any action commenced within the times before limited, or upon any writ of error brought thereon, he may commence a new action thereon within one year thereafter, in case his right of action is not barred by such judgment.

SECT. 11. The provisions of this chapter shall not apply to any case in which, by any statute, different time is limited.

## MASSACHUSETTS.

*Real Actions. (Revised Statutes, Ch. 119.)*

SECTION 1. No person shall commence an action for the recovery of any lands, nor shall make an entry thereupon, unless within twenty years after the right to make such entry or bring such action first accrued, or \* within twenty years after he, or those from, by, or under [\* xlviii] whom he claims, shall have been seised or possessed of the premises, except as is hereinafter provided.

SECT. 2. If such right or title first accrued to any ancestor or predecessor of the person who brings the action or makes the entry, or to any other person from, by, or under whom he claims, the said twenty years shall be computed from the time when the right or title so first accrued to such ancestor, predecessor, or other person.

SECT. 3. In the construction of this chapter, the right to make an entry or bring an action to recover land shall be deemed to have first accrued at the times respectively hereinafter mentioned, that is to say: —

*First.* When any person shall be disseised, his right of entry or of action shall be deemed to have accrued at the time of such disseisin.

*Secondly.* When he claims as heir or devisee of one who died seised, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy by the curtesy, or other estate, intervening after the death of such ancestor or devisor, in which case, his right shall be deemed to accrue when such intermediate estate shall expire, or when it would have expired by its own limitation.

*Thirdly.* When there is such an intermediate estate, and in all other cases, when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof, for which he might have entered at an earlier time.

*Fourthly.* The preceding clause shall not prevent any person from entering, when entitled to do so by reason of any forfeiture or breach of condition, but if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred, or the condition was broken.

*Fifthly.* In all cases not otherwise specially provided for, the right shall be deemed to have accrued when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title upon which the entry or the action is founded.

SECT. 4. If any minister, or other sole corporation, shall be disseised, any of his successors may enter upon the premises, or may bring an action for the recovery thereof, at any time within five years after the death

resignation, or removal of the person so disseised, notwithstanding the twenty years after such disseisin shall have expired.

SECT. 5. If, at the time when such right of entry or of action upon or for any lands shall first accrue as aforesaid, the person entitled to such entry or action shall be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person, or any one claiming from, by, or under him, may make the entry [\* xlix] or \* bring the action at any time within ten years after such disability shall be removed, notwithstanding the twenty years before limited in that behalf shall have expired.

SECT. 6. If the person first entitled to make such entry, or bring such action, shall die during the continuance of any of the disabilities mentioned in the preceding section, and no determination or judgment shall have been had of or upon the title, right, or action, which accrued to him, the entry may be made, or the action brought by his heirs, or any other person claiming from, by, or under him, at any time within ten years after his death, notwithstanding the said twenty years shall have expired.

SECT. 7. If, at the time when such right of entry or of action shall first accrue, the person entitled thereto shall be under any of the disabilities before mentioned, and shall die without having recovered the premises, no further time for making such entry or bringing such action beyond what is hereinbefore prescribed, shall be allowed, by reason of the disability of any other person.

SECT. 8. No person shall be deemed to have been in possession of any lands, within the meaning of this chapter, merely by reason of having made an entry thereon, unless he shall have continued in open and peaceable possession of the premises for the space of one year next after such entry, or unless an action shall be commenced upon such entry and seisin within one year after he shall be ousted or dispossessed of the premises.

SECT. 9. When the right of entry or of action of a tenant in tail, or of a person entitled to a remainder in tail, is barred by force of this chapter, the estate tail, and all remainders and reversions expectant thereon, shall be also barred, as fully as they might have been by a conveyance made by the tenant in tail, in the manner provided in the fifty-ninth chapter.

SECT. 10. When any person, entitled to recover land as a tenant in tail, or a remainder-man in tail, shall die before the expiration of the period herein before limited for making an entry or bringing an action therefor, no person claiming any estate which the tenant in tail or remainder-man might have barred shall make an entry or bring an action to recover such land, but within the period during which the tenant in tail or remainder-man, if he had so long lived, might have made such entry or brought such action.

SECT. 11. The limitations herein before prescribed, as to the time within

which an action may be brought to recover any land, shall take effect from and after the thirty-first day of December, in the year of our Lord eighteen hundred and thirty-nine; and if any person who shall then be entitled to bring any real action, which is to be abolished after that day, shall then be within the age of twenty-one years, a married woman, insane, imprisoned, or without the limits of the United States, the action may be \* brought at any time within five years after the disability shall [ \* 1 ] cease, or after the death of the person so disabled; provided, that no such action shall be maintained, after it would have been barred by the statutes of limitations in force at and immediately before the time when this chapter shall become a law.

SECT. 12. No suit for the recovery of any lands shall be commenced by or in behalf of the commonwealth, unless within twenty years after the right or title of the commonwealth thereto first accrued, or within twenty years after the commonwealth, or those from or through whom they claim, shall have been seised or possessed of the premises.

SECT. 13. No descent or discontinuance which may hereafter occur shall take away or defeat any right of entry, or of action, for the recovery of real estate.

SECT. 14. When a notice shall be given to prevent the acquisition of a right or privilege of way, air, or light, as provided in the sixtieth chapter, such notice shall be considered so far a disturbance of the right in question, as to enable the party claiming such right to bring an action on the case, as for a nuisance or disturbance, for the purpose of trying the right; and, if the plaintiff in such action shall prevail, he shall be entitled to full costs, although he should recover only nominal damages.

SECT. 15. If any action of which the commencement is limited by this chapter shall be abated by the death of any party thereto, or if, after verdict for the demandant or plaintiff, the judgment shall be arrested, or if judgment in any such action be given for the demandant or plaintiff, and the judgment shall be reversed for error therein, the demandant or plaintiff, or any person claiming from, by, or under him, may bring a new action for the same cause, at any time within one year after the determination of the original action, or after the reversal of the judgment therein.

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*Personal Actions. (Revised Statutes, Ch. 120.)*

SECTION 1. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards:—

*First.* All actions of debt, founded upon any contract, or liability not under seal, except such as are brought upon the judgment or decree of



some court of record of the United States, or of this, or some other of the United States.

*Secondly.* All actions upon judgments rendered in any court, not being a court of record.

*Thirdly.* All actions for arrears of rent.

.[\* li] \* *Fourthly.* All actions of assumpsit, or upon the case, not founded on any contract or liability, express or implied.

*Fifthly.* All actions for waste and for trespass upon land.

*Sixthly.* All actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels.

*Seventhly.* All other actions on the case, except actions for slanderous words, and for libels.

SECT. 2. All actions for assault and battery, and for false imprisonment, and all actions for slanderous words and for libels, shall be commenced within two years next after the cause of action shall accrue, and not afterwards.

SECT. 3. All actions against sheriffs, for the misconduct or negligence of their deputies, shall be commenced within four years next after the cause of action shall accrue, and not afterwards.

SECT. 4. None of the foregoing provisions shall apply to any action brought upon a promissory note which is signed in the presence of an attesting witness, provided the action be brought by the original payee, or by his executor or administrator, nor to an action brought upon any bills, notes, or other evidences of debt, issued by any bank.

SECT. 5. In all actions of debt or assumpsit, brought to recover the balance due upon a mutual and open account-current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

SECT. 6. If any person entitled to bring any of the actions before mentioned in this chapter shall at the time the cause of action accrues be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person may bring the said actions, within the times in this chapter respectively limited, after the disability shall be removed, or within six years after the disability mentioned in the preceding section.

SECT. 7. All personal actions on any contract, not limited by the foregoing sections, or by any other law of this Commonwealth, shall be brought within twenty years after the accruing of the cause of action.

SECT. 8. When any person shall be disabled to prosecute an action in the courts of this Commonwealth, by reason of his being an alien, subject, or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods herein limited for the commencement of any of the actions before mentioned.

SECT. 9. If at the time when any cause of action mentioned in this chapter shall accrue against any person, he shall be out of the State, the action may be commenced within the time herein limited therefor, after such person shall come into the State; and if, after any cause of action shall have accrued, the person against whom it has accrued shall be absent from and reside out of the State, the time of his absence shall not \* be taken as any part of the time limited for the commencement [\* lii] of the action.

SECT. 10. If any person, entitled to bring any of the actions before mentioned in this chapter, or liable to any such action, shall die before the expiration of the time herein limited therefor, or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time within two years after the grant of letters testamentary or of administration, and not afterwards, if barred by the provisions of this chapter.

SECT. 11. If, in any action duly commenced, within the time in this chapter limited and allowed therefor, the writ shall fail of a sufficient service or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if after a verdict for the plaintiff the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year.

SECT. 12. If any person who is liable to any of the actions mentioned in this chapter shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within six years after the person who is entitled to bring the same shall discover that he has such cause of action, and not afterwards.

SECT. 13. In actions of debt or upon the case, founded on any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing, signed by the party chargeable thereby.

SECT. 14. If there are two or more joint contractors, or joint executors or administrators, of any contractor, no such joint contractor, executor, or

administrator shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any acknowledgment or promise, made or signed by any other or others of them.

SECT. 15. In actions commenced against two or more joint contractors, or joint executors or administrators of any contractor, if it shall appear on the trial, or otherwise, that the plaintiff is barred by the provisions of this chapter, as to one or more of the defendants, but is entitled to re- [\* liii] cover \* against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any of the defendants against whom he is entitled to recover, and for the other defendant or defendants against the plaintiff.

SECT. 16. If, in any action on contract, the defendant shall plead in abatement, that any other person ought to have been jointly sued, and issue be joined on that plea, and if it shall appear on the trial that the action was, by reason of the provisions of this chapter, barred against the person so named in the plea, the said issue shall be found for the plaintiff.

SECT. 17. Nothing contained in the four preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest, made by any person; but no indorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the provisions of this chapter.

SECT. 18. If there are two or more joint contractors, or joint executors or administrators of any contractor, no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any payment, made by any other or others of them.

SECT. 19. All the provisions of this chapter shall apply to the case of any debt or contract, alleged by way of set-off on the part of a defendant; and the time of limitation of such debt shall be computed in like manner as if an action had been commenced therefor, at the time when the plaintiff's action was commenced.

SECT. 20. The limitations herein before prescribed, for the commencement of actions, shall apply to the same actions when brought in the name of the Commonwealth, or in the name of any officer, or otherwise, for the benefit of the Commonwealth, in the same manner as to actions brought by citizens.

SECT. 21. All actions and suits, for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year next after the offence committed, and not afterwards.

SECT. 22. If the penalty or forfeiture is given in whole or in part to the Commonwealth, a suit therefor may be commenced by or in behalf of the Commonwealth, at any time within two years after the offence committed, and not afterwards.

SECT. 23. The two preceding sections shall not apply to any suit which is or shall be limited by any statute, to be brought within a shorter time than is prescribed in these two sections; but such suit shall be brought within the time that may be limited by such statute.

\* SECT. 24. Every judgment and decree in any court of record [\* liv] of the United States, or of this or any other State, shall be presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered.

SECT. 25. None of the provisions of this chapter, respecting the acknowledgment of a debt, or a new promise to pay it, shall apply to any such acknowledgment or promise, made before the first day of October, in the year one thousand eight hundred and thirty-four; but every such last-mentioned acknowledgment or promise, although not made in writing, shall have the same effect as if no provision relating thereunto had been herein contained.

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CONNECTICUT.

*Civil Actions and Criminal Prosecutions. (Revised Statutes, tit. 60.)*

SECTION 1. No person shall, at any time hereafter, make entry into any lands or tenements, but within fifteen years next after his right or title shall first descend or accrue to the same; and every such person so not entering, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless an action shall be commenced thereupon, and prosecuted with effect, within one year next after the making thereof. Provided, nevertheless, that if any person who hath, or shall have, such right or title of entry into any lands or tenements, be, or shall be, at the time of the first descending or accruing of the said right or title, within the age of twenty-one years, *feme covert*, *non compos mentis*, or imprisoned, then such person and his heirs may, notwithstanding the expiration of the said fifteen years, bring such action, or make such entry as he might have done before the expiration of the said fifteen years, so as such person shall, within five years next after full age, discoveriture, coming of sound mind, enlargement out of prison, or the heirs of such person shall, within five years after the death of such person, bring such action, or make such entry, and take benefit of the same.

SECT. 2. No action shall be brought on any bond, or writing obligatory,

contract under seal, or promissory note not negotiable, but within seventeen years next after an action on the same shall accrue. Provided, nevertheless, that persons legally incapable to bring an action on such bond, or writing, at the accruing of the right of action thereon, may bring the same at any time within four years after their becoming legally capable to bring such action.

[\* lv] \* SECT. 3. No action of account, of debt on book, or on simple contract, or of assumpsit, founded upon implied contract, or upon any contract in writing, not under seal, except promissory notes not negotiable, shall be brought but within six years next after the right of action shall accrue. Provided, nevertheless, that persons legally incapable to bring any such action at the accruing of the right of action, may bring the same at any time within three years after their becoming legally capable to bring such action.

SECT. 4. No action of trespass on the case shall be brought but within six years next after the right of action shall accrue.

SECT. 5. No action founded upon any express contract or agreement, other than actions of book debt, on proper subjects thereof, not reduced to writing, or some note or memorandum thereof, made in writing, and signed by the party to be charged therewith, or some other person by him lawfully authorized; no action of trespass, and no action upon the case for words, shall be brought but within three years next after the right of action shall accrue.

SECT. 6. No suit or action for any forfeiture, upon any penal statute, shall be brought by any person or persons who may lawfully sue for the same, but within one year next after the offence committed.

SECT. 7. No suit or action, either in law or equity, shall be brought against any sheriff's deputy, or constable, for any neglect or default in his office and duty, but within two years next after the right of action shall accrue.

SECT. 8. If in any of the said suits or actions, judgment be given for the plaintiff, and, the same be reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his writ, declaration, or bill; in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new suit or action, at any time within a year after such judgment reversed, or such judgment given against the plaintiff. And, in computing the time limited in the several cases aforesaid, the time during which the party against whom there may be any such cause of action, shall be without this State, shall be excluded from the computation. In all cases, hereinbefore specified, wherein by the laws of this State hitherto in force, no time is limited for the bringing of said actions, or a longer time is allowed therefor than the

time herein limited, such last-mentioned time shall commence on, and be computed from, the first day of June, one thousand eight hundred and twenty-one.

SECT. 9. No writ of error shall be brought for the reversal of any judgment, after the expiration of three years from the time of rendering such judgment.

SECT. 10. No petition for a new trial, in any case in which final judgment hath been or shall have been rendered, either in chancery \* or at law, shall be brought, but within three years next after [\* lvi] the judgment or decree complained of shall have been rendered or passed.

SECT. 11. No person shall be indicted, informed against, complained of, or in any way prosecuted, before any court, for treason against this State, or for any crime or misdemeanor, whereof the punishment is, or may be, imprisonment in Newgate prison, unless the indictment, presentment, or complaint be made and exhibited within three years next after the offence shall have been committed; nor shall any person be indicted, informed against, complained of, or in any way prosecuted before any court, for the breach of any penal law, or for other crime or misdemeanor, excepting crimes punishable by death, or imprisonment in Newgate prison, unless the indictment, presentment, information, or complaint be made and exhibited within one year next after the offence shall have been committed. Provided, that any action or prosecution, proper for the recovery of any penalty incurred by the breach of any of the provisions of the law relating to the slave-trade, or concerning Indian, mulatto, and negro servants and slaves, may be brought and prosecuted at any time within three years after such cause of action shall arise. Provided, that if the person against whom such indictment, presentment, information, or complaint shall be brought or exhibited, shall have fled from and have resided out of this State, during the period limited as aforesaid, for the prosecution of the offence charged, then the same may be brought and exhibited against such person at any time within such period, during which he shall reside within this State, after the commission of the offence. And provided, also, that where any suit, indictment, presentment, information, or complaint, for any crime or misdemeanor, is or shall be limited by any other statute, to be brought or exhibited within a shorter time than is hereby limited, the same shall be brought or exhibited within the time limited by such statute.

An additional statute (1833) enacts, that in all cases in which the time limited by the Act to which this is in addition, for the commencement of any personal action, which by law survives to the representatives of any deceased person, shall not have elapsed at the time of the decease of any such person, the term of one year shall be allowed to his executor or admin-

istrator, from the time of such decease, to institute a suit therefor; and in computing the time limited in said Act, in the cases aforesaid, such term shall be excluded from the computation.

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RHODE ISLAND.

*Personal Actions. (Revised Laws, p. 220.)*

[\* lvii] \* SECTION 1. All actions of trespass, trespass and ejectment, detinue or replevin; all actions of account and upon the case, except on such accounts as concern trade or merchandise between merchant and merchant, their factors or servants; all actions of debt founded upon any contract without specialty; all actions of debt from arrearages of rents; actions of debt for other causes, and all actions of covenant which shall be sued or brought at any time, after this Act shall go into operation, shall be commenced and sued within the time hereinafter directed, and not after; that is to say, the said actions upon the case, excepting actions for slander, and the said actions of account, and the said actions for debt, founded upon any contract without specialty, or brought for arrearages of rents, and all actions of detinue and replevin, shall be brought and commenced within six years after the cause of the said actions, and not after; the said actions of trespass, and trespass and ejectment, shall be brought within four years next after the cause of such action, and not after; and actions upon the case for words within two years next after the words spoken, and not after; all actions of debt, other than those before specified, and all actions of covenant, within twenty years next after the cause of said actions, and not after.

SECT. 2. If any person against whom there is or shall be cause for any action, herein before enumerated, shall, at the time such cause accrue, be without the limits of this State, or, being within said State at the time such cause accrue, shall go out of said State before said action shall be barred by this Act, and shall not have or leave property or estate therein that can, by the common and ordinary process of law, be attached, then and in such case, the person entitled to such action may commence the same, within the time before limited, after such persons return into this State.

SECT. 3. If any person at the time any such action shall accrue to him shall be within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the limits of the United States, such person may bring the same, within such time as is herein before limited, after such impediment is removed.

SECT. 4. If any person, for or against whom any of said actions shall



accrue, shall die before the time limited for bringing the same, or within thirty days after the expiration of said time, and the cause of said action shall survive, such action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time within one year after the granting of letters testamentary or of administration, and not afterwards, if barred by the provisions of this Act.

\* SECT. 5. If any action duly commenced, within the time limited and allowed therefor, in and by this Act, shall be abated or otherwise avoided or defeated by the death of any party thereto, or for any matter, or if, after verdict for the plaintiff, the judgment shall be arrested, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit as aforesaid; and, if the cause of action does by law survive, his executor or administrator may, in case of his death, commence said new action, within the said one year.

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*For quieting Possessions and avoiding Suits at Law. (Revised Laws, p. 219.)*

SECTION 1. All grants, charters, and conveyances heretofore made by the general assembly unto any town, corporation, community, or propriety, or to any other person or persons whosoever, shall be, and they hereby are, ratified and confirmed as good and effectual to all intents and purposes, in law, for the conveying all such lands, tenements, rights, privileges, and profits as are therein mentioned, to the said towns, corporations, communities, proprietries, person or persons, and to their respective successors, heirs, and assigns for ever.

SECT. 2. Where any person or persons, or others from whom he or they derive their title, either by themselves, tenants, or lessees, shall have been for the space of twenty years in the uninterrupted, quiet, peaceable, and actual seisin and possession of any lands, tenements, or hereditaments, for and during the said time, claiming the same as his, her, or their proper, sole, and rightful estate in fee-simple, such actual seisin and possession shall be allowed to give and make a good and rightful title to such person or persons, their heirs and assigns for ever; and any plaintiff suing for the recovery of any such lands may rely upon such possession as conclusive title thereto; and this Act being pleaded in bar to any action that shall hereafter be brought for such lands, tenements, or hereditaments, and such actual seisin and possession being duly proved, shall be allowed to be good, valid, and effectual in law for barring the same: *Provided*, that nothing in this Act shall be construed, deemed, or taken to extend to prejudice the

rights and claims of persons under age, *non compos mentis*, *feme covert*, or those imprisoned, or those beyond the limits of the United States; they bringing their suit therefor within the space of ten years next after such impediment is removed: *Provided further*, that nothing above contained shall extend, or be construed or deemed to extend, to bar any person or persons having any estate in reversion or remainder, expectant or depending, in any lands, tenements, or hereditaments, after the end or determination of the estate for years, life, or lives; such person or persons [\*lix] pursuing \*his or their title by due course of law, within ten years after his or their right of action shall accrue; any thing in this Act contained to the contrary notwithstanding.

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## MIDDLE STATES.

### NEW YORK.

*Real Property. (Revised Statutes, Vol. 2, Part 3, Ch. 4, tit. 2.)*

SECTION 1. The people of this State will not sue or implead any person for, or in respect to, any lands, tenements, or hereditaments, or for the issues or profits thereof, by reason of any right or title of the said people to the same, unless, —

*First.* Such right or title shall have accrued within twenty years before any suit, or other proceeding, for the same shall be commenced; or, unless,

*Second.* The said people, or those from whom they claim, shall have received the rents and profits of such real estate, or of some part thereof, within the said space of twenty years.

SECT. 2. The last preceding section shall not extend to any suit or prosecution for, or in respect to, any liberties or franchises.

SECT. 3. No action shall be brought for, or in respect to, any lands, tenements, or hereditaments, by any person claiming by virtue of any letters-patent, or grants from the people of this State, unless the same might have been commenced by the people of this State, as herein specified, in case such patent or grant had not been issued or made.

SECT. 4. When letters-patent, or grants of any lands or tenements, shall have been issued or made by the people of this State, and the same shall be declared void by the judgment or decree of some competent court, rendered upon a suggestion of concealment, or wrongful detaining, or defective title, in such case, an action, for the recovery of the premises so conveyed, may be brought, either by the people of this State, or by any subsequent patentee or grantee of the same premises, his heirs or assigns,

within twenty years after such judgment or decree was rendered; but not after that period.

SECT. 5. No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within twenty years before the commencement of such action.

SECT. 6. No avowry or cognizance of title to real estate, or to any \* rents or services, shall be valid, unless it appear that the per- [\* lx] son making the avowry, or the person in whose right the cognizance is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question, within twenty years before the committing the act in defence of which such avowry or cognizance is made.

SECT. 7. No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereupon within one year after the making of such entry and within twenty years from the time when the right to make such entry descended or accrued.

SECT. 8. In every action for the recovery of real estate, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof, within the time required by law; and the occupation of such premises by any other person shall be deemed to have been under, and in subordination to, the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for twenty years before the commencement of such action.

SECT. 9. Whenever it shall appear that the occupant or those under whom he claims entered into the possession of any premises under claim of title exclusive of any other right, founding such claim upon some written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of some competent court; and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for twenty years, the premises so included shall be deemed to have been held adversely; except that, where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

SECT. 10. For the purpose of constituting an adverse possession, by any person claiming a title founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:—

*First.* Where it has been usually cultivated or improved.

*Second.* Where it has been protected by a substantial enclosure.

*Third.* Where, although not enclosed, it has been used for the supply of

fuel, or of fencing timber, for the purpose of husbandry, or the ordinary use of the occupant.

*Fourth.* Where a known farm, or single lot, has been partly improved, the portion of such farm or lot that may have been left not cleared, or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time, as the part improved and cultivated.

SECT. 11. Where it shall appear that there has been an actual continued occupation of any premises, under a claim of title, exclusive of any other right, but not founded upon any written instrument, or any judgment [\* lxi] or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely.

SECT. 12. For the purpose of constituting an adverse possession, by a person claiming title not founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied, in the following cases only : —

*First.* Where it has been protected by a substantial enclosure.

*Second.* Where it has been usually cultivated or improved.

SECT. 13. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy ; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent ; notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumption shall not be made after the periods herein limited.

SECT. 14. All writs of *scire facias* upon fines, heretofore levied of any manors, lands, tenements, or hereditaments, shall be sued out within twenty years next after the title and cause of action first descended or fallen ; and not after that period.

SECT. 15. The right of any person to the possession of any real estate shall not be impaired or affected by a descent being cast in consequence of the death of any person in possession of such estate.

SECT. 16. If any person entitled to commence any action in this article specified, or to make any entry, avowry, or cognizance, be at the time such title shall first descend or accrue, either,

*First.* Within the age of twenty-one years ; or,

*Second.* Insane ; or,

*Third.* Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life ; or,

*Fourth.* A married woman :

The time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of

such suit, or the making such entry, avowry, or cognizance; but such person may bring such action, or make such entry, avowry, or cognizance, after the said time so limited, and within ten years after such disability removed, but not after that period.

SECT. 17. If the person entitled to commence such action, or to make such entry, avowry, or cognizance, shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of the title, right, or action to him accrued, his heirs may commence such action, or make such entry, avowry, or cognizance, after the time in this article limited for that purpose, and within ten years after his death; but not after that period.

*Actions for the Recovery of any Debt or Demand or for Damages only.*

\* SECT. 18. The following actions shall be commenced within [\*lxii] six years next after the cause of action accrued, and not after: —

*First.* All actions of debt founded upon any contract, obligation, or liability, not under seal, excepting such as are brought upon the judgment or decree of some court of record of the United States, or of this or some other State.

*Second.* All actions upon judgments rendered in any court not being a court of record.

*Third.* All actions of debt for arrearages of rent not reserved by some instrument under seal.

*Fourth.* All actions of account, assumpsit, or on the case, founded on any contract or liability, express or implied.

*Fifth.* All actions for trespass upon land.

*Sixth.* All actions for taking, detaining, or injuring goods or chattels, including actions of replevin.

*Seventh.* All special actions on the case for criminal conversation, for libels, or for any other injury to the persons or rights of any, except such as are specified in the two next sections.

SECT. 19. The following actions shall be commenced within four years after the cause of action accrued, and not after: —

*First.* All actions for assault and battery.

*Second.* All actions for false imprisonment.

SECT. 20. The following actions shall be commenced within two years after the cause of action accrued, and not after: —

*First.* Actions for words spoken, slandering the character or title of any person.

*Second.* Actions for words spoken whereby special damages are sustained.

SECT. 21. All actions against sheriffs or other officers, for the escape of

persons imprisoned on civil process, shall be commenced within one year from the time of such escape, and not after.

SECT. 22. All actions against sheriffs and coroners, upon any liability incurred by them, by the doing any act in their official capacity, or by the omission of any official duty except for escapes, shall be brought within three years after the cause of action shall have accrued, and not after that period.

SECT. 23. In all actions of debt, account, or assumpsit, brought to recover any balance due upon a mutual, open, and current account, the cause of action shall be deemed to have accrued from the time of the last item proved in such account.

SECT. 24. If any person entitled to bring any action in this [\*lxiii] article \* specified (excepting actions against sheriffs or other officers for escapes) shall, at the time the cause of action accrued, be either,

*First.* Within the age of twenty-one years ; or,

*Second.* Insane ; or,

*Third.* Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than for his natural life ; or,

*Fourth.* A married woman ;

Such person shall be at liberty to bring such actions within the respective times in this article limited, after such disability removed.

SECT. 25. None of the provisions of this article shall apply to suits brought to enforce payment on bills, notes, or other evidences of debt issued by moneyed corporations.

SECT. 26. If any person entitled to bring any action in this article specified shall die before the expiration of the time herein limited for the commencement of such suit, if such cause of action shall survive to his representatives, his executor or administrator may, after the expiration of such time, and within one year after such death, commence such action ; but not after that period.

SECT. 27. If at the time when any cause of action specified in this article shall accrue against any person, he shall be out of this State, such action may be commenced within the terms herein respectively limited, after the return of such person into this State ; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

SECT. 28. The limitations in this article prescribed, for the commencement of actions, shall apply to the same actions, when brought in the name of the people of this State, or in the name of any public officer, or otherwise, for the benefit of the said people, in the same manner as to actions brought by citizens.

*Penalties and Forfeitures.*

SECT. 29. All actions upon any statute made, or to be made, for any forfeiture or penalty, to the people of this State, shall be commenced within two years after the offence shall have been committed, and not after.

SECT. 30. All actions upon any statute made, or to be made, for any forfeiture or penalty, given in whole or in part to any person who will prosecute for the same, shall be commenced within one year after the offence shall have been committed, and not after; and in case such action be not commenced within that time by any private citizen, then the same shall be commenced within two years after that year ended, in behalf of the people of this State, by the attorney-general, or the district attorney of the county where the offence was committed, and not after.

SECT. 31. All actions upon any statute made, or to be made, for any \* forfeiture or cause, the benefit and suit whereof is [\* lxiv] limited to the party aggrieved, or to such party and the people of this State, shall be commenced within three years after the offence committed, or the cause of action accrued, and not after.

*Persons and Cases excepted from the Operation of the preceding Articles of this Title.*

SECT. 32. Whenever any person shall be disabled to prosecute in the courts of this State, by reason of his being an alien, subject or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods limited in the first and second articles of this title, for the making of any entry or the commencement of any action.

SECT. 33. If any action shall have been commenced within the times respectively prescribed in the three first articles of this title, and judgment be given therein for the plaintiff, and the same be arrested or reversed on error, the plaintiff may commence a new action, from time to time, within one year after such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may in like manner commence a new action, within the time herein allowed to such plaintiff.

SECT. 34. If any action shall have been commenced within the times respectively prescribed in the three first articles of this title, and the defendant in such suit die before judgment; and if the right of action be such as survives against the representatives of the defendant, the plaintiff may commence a new action against the heirs, executors, or administrators of such defendant, as the case may require, within one year after such death;



or, if no executors or administrators be appointed within that time, then within one year after letters testamentary, or of administration, shall have been granted to them.

SECT. 35. When an action commenced within the time prescribed by law shall abate by reason of the death of the plaintiff, if the right of action survive to his representatives, his executor or administrator may, within one year after such death, commence a new action, if the cause of such action would otherwise survive; and, if any action so commenced by an executor or administrator shall abate by the death of the plaintiff, a new action may be commenced by the administrator of the same estate, at any time within one year after such abatement.

SECT. 36. Whenever the commencement of any suit shall be stayed by an injunction of any court of equity, the time during which such injunction shall be in force shall not be deemed any portion of the time in this chapter limited for the commencement of such suit.

SECT. 37. Whenever the commencement of any suit shall be prevented, by reason of any privilege of any member of either house of the [\* lxxv] legislature, \* of this State, or of any member of either house of the Congress of the United States, the time during which the same shall have been so prevented shall not be deemed any portion of the time limited for the commencement of any suit for the recovery of any debt, demand, or damages only.

SECT. 38. No action for the recovery of any debt, demand, or damages only, or for the recovery of any penalty or forfeiture, shall be deemed to have been commenced within the meaning of this chapter, unless it appear, —

*First.* That the first process or proceeding therein was duly served upon the defendants, or some one of them: or,

*Second.* That a *capias ad respondendum* was issued within the time required by law, to the sheriff of the county in which the defendants, or one of them, usually resided, or last resided, in good faith, and with intent to be actually served; and that such writ was duly returned:

*Third.* If a corporation be defendant, that the first process was in like manner issued to the sheriff of the county in which such corporation was located by law, or in which the place of transacting its business was situated, with the intent to be actually served; and that such process was duly returned.

SECT. 39. When a suit shall be alleged by a plaintiff to have been commenced within the time required by law, and such allegation shall be put in issue by the defendant, it shall be competent for the defendant to prove, on the trial, that the process issued by the plaintiff was not issued with the intent or in the manner required by law; or that it was issued to the sheriff of one county, when the plaintiff knew, or had reason to believe,

that the defendant was in another county, and could have been arrested; or that any means whatever were used by the plaintiff or his attorney to prevent the service of the writ, or to keep the defendant in ignorance of the issuing thereof.

SECT. 40. Upon any such matter being established, or upon it appearing in any other way, that any process was issued without any intent that it should be served, such process shall not be deemed the commencement of a suit, within the meaning of any of the provisions of this chapter.

SECT. 41. No person shall avail himself of any disability enumerated in this title, unless such disability existed at the time his right of action, or of entry, accrued.

SECT. 42. Where there shall be two or more such disabilities existing at the time the right of action or of entry accrued, the limitations herein prescribed shall not attach, until all such disabilities be removed.

SECT. 43. The provisions of this title shall not extend to any action which is or shall be limited by any statute, to be brought within a shorter time than is herein prescribed; but such action shall be brought within the time limited by such statute.

SECT. 44. None of the provisions of this chapter shall apply to suits against directors or stockholders of any moneyed corporations, to recover \*any penalty or forfeiture imposed, or to enforce any [\*lxvi] liability created, by the second title of the eighteenth chapter of the first part of the revised statutes; but all such suits shall be brought within six years after the discovery, by the aggrieved party, of the facts upon which such penalty or forfeiture attached, or by which such liability was created.

SECT. 45. The provisions of the preceding articles of this title shall not apply to any actions commenced, nor to any cases where the right of action shall have accrued, or the right of entry shall exist, before the time when this chapter takes effect as a law; but the same shall remain subject to the laws now in force.

*Presumption of Payment arising from the Lapse of Time.*

SECT. 46. The presumption of payment shall apply to all judgments of a Court of Record in this State, rendered before the third day of April, one thousand eight hundred and twenty-one, and to all such judgments rendered before this chapter shall take effect as a law, in the same manner as such presumption applies to sealed instruments.

SECT. 47. Every judgment and decree hereafter rendered in any court of this State, or of the United States, or of any other State or Territory within the United States, shall be presumed to be paid and satisfied, after the expiration of twenty years from the time of the signing and filing such

judgment or decree; but in any suit at law or in equity in which the party against whom such judgment or decree was rendered, or his heirs or personal representatives, shall be a party, such presumption may be repelled by proof of payment, or of written acknowledgment of indebtedness, made within twenty years, of some part of the amount recovered by such judgment or decree: in all other cases, it shall be conclusive.

SECT. 48. After the expiration of twenty years from the time a right of action shall accrue upon any sealed instrument, for the payment of money, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action within that period.

*Time of commencing Suits in Courts of Equity.*

SECT. 49. Whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity of any cause of action, the provisions of this title limiting a time for the commencement of a suit for such cause of action, in a court of common law, shall apply to all suits hereafter to be brought for the same cause in the court of chancery.

SECT. 50. But the last section shall not extend to suits over the subject-matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject-matter is not cognizable in the courts of common law.

SECT. 51. Bills for relief, on the ground of fraud, shall be filed [\* lxvii] within six \* years after the discovery by the aggrieved party of the facts constituting such fraud, and not after that time.

SECT. 52. Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after.

SECT. 53. But if the person entitled to file any bill specified in the two last sections be, at the time of discovering the facts constituting such fraud, or at the time the cause for filing such bill shall accrue, under any of the disabilities in the first and second articles of this title enumerated, the time during which such disability shall continue shall be excepted from the limitations contained in the two last sections, in the same manner and with the like effect, as such time is herein excepted from the limitations prescribed for commencing actions at law; and in case of the death of the person so entitled during such disability, or before the expiration of the time herein limited for filing such bills, the same may be filed by the heirs or representatives of such person, as the case may require, within the same time as allowed in the said first and second articles for commencing actions at law in the like cases.

## NEW JERSEY.

*Suits respecting Titles to Land, and Personal Actions. (Digest of Laws of New Jersey, 1838, p. 314.)*

**SECTION. 1.** Sixty years' actual possession of any lands, tenements, or other real estate, uninterruptedly continued by occupancy, descent, conveyance, or otherwise, in whatever way or manner such possession might have commenced, or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements, or other real estate, and shall be a good and sufficient bar to all claims that may be made, or actions commenced, by any person or persons whatever for the recovery of any such lands, tenements, or other real estate.

**SECT. 2.** Thirty years' actual possession of any lands, tenements, or other real estate, uninterruptedly continued as aforesaid, wherever such possession commenced, or is founded upon a proprietary right duly laid thereon, and recorded in the surveyor-general's office of the division in which such location was made, or in the secretary's office, agreeably to law, or wherever such possession was obtained by a fair, *bona fide* purchase of such lands, tenements, or other real estate, of any person or persons whatever in possession, and supposed to have a legal right and title thereto, or of the agent or agents of such person or persons, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances, or claims whatever, not followed \* by actual possession as aforesaid, [\* lxviii] and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements, or other real estate. *Provided*, if any person or persons, having a right or title to lands, tenements, or other real estate, shall, at the time of the said right or title first descended or accrued, be within the age of twenty-one years, *feme covert*, *non compos*, imprisoned, or without the United States of America, then such person or persons, and his and their heir or heirs, may, notwithstanding the aforesaid times are expired, be entitled to his or their action for the same, so as such person or persons or his or their heirs, commence or sue forth his or their action within five years after his or their full age, discoveriture, coming of sound mind, enlargement out of prison, or coming within any of the United States, and at no time after. *And provided also*, any citizen or citizens of this or any other of the United States, and his or their heirs, having right or title to any lands, tenements, or other real estate within this State, may, notwithstanding the aforesaid times are expired, commence his or their action for such lands, tenements, or other real estate, at any time within five years next after the passing this Act, and not afterwards.

**SECT. 3.** Any survey made of any lands within either the eastern or western division of the proprietors of the State of New Jersey, and

inspected and approved of by the general proprietors, or council of proprietors of such division, and by their order or direction entered upon record in the secretary's office of this State, or in the surveyor-general's office in such division, shall, from and after such record is made, preclude and for ever bar such proprietors and their successors from any demand thereon, any plea of deficiency of right or otherwise notwithstanding.

SECT. 4. If any person or persons, for the purpose of establishing the boundaries of lands between them, shall, by certificate under their hands and seals, executed in the presence of two or more subscribing witnesses, certify unto the clerk of the county or counties wherein such line or partition shall lay any lines, corners, and boundaries, as shall by them be allowed and acknowledged to be the true bounds betwixt their lands, and the said certificate filed in said clerk's office, and recorded by said clerk in a book to be by him provided for that purpose, shall be as fully conclusive and binding to the parties so certifying, and their heirs and successors, as could have been done by deeds of quitclaim, or in any other manner whatsoever.

A supplement to the above Act, passed 28th November, 1789, enacts :

SECT. 1. No such newly made partial survey, now lying with the council of proprietors, or which may hereafter be returned to them, or made on any lands improved or unimproved within what has been usually taken and deemed to be the ancient reputed boundary of such lands, shall be recorded or be of any avail to the person so surveying, unless it [\* lxix] shall be \* made to appear, by the testimony of at least two good and sufficient witnesses, that the possessor or possessors holding such lands by survey, deed, or otherwise, had been duly notified, for the space of six months previous to the making such survey, of the intention of doing thereof, and had refused or neglected to resurvey and cover such overplus lands.

SECT. 2. If the council of proprietors shall refuse or neglect to give the preference to any prior survey, legally made, or to the possessor or possessors of any tract of land, enabling such possessor or possessors to cover with rights, and secure such overplus lands, which may be found within their ancient bounds, on such possessor or possessors making a resurvey of his or their lands within six months after such legal notice as aforesaid, that it shall and may be lawful for such possessor or possessors, or any other person legally authorized on his, her, or their behalf, to cause a resurvey to be made, agreeably to the ancient reputed lines and boundaries, either by a deputy surveyor, or some other person understanding the art of surveying, and appropriate so many rights thereon as will be sufficient to include the overplus, which surveyor or person so surveying, being duly qualified before a justice of the peace of the county wherein the land

may lie, that the survey, so by him made, is just according to the best of his knowledge, the same may be produced to the clerk of the county, who is hereby required, on the receipt thereof, to record the same in the book directed to be kept in the respective counties, by the Act entitled "An Act for the limitations of suits at law respecting titles to land," passed at Burlington the fifth day of June, seventeen hundred and eighty-seven, which survey so made and recorded shall give such owner and possessor an absolute title in fee.

SECT. 3. Nothing in this Act contained shall be construed or taken to authorize any person or persons to make any survey within the certain or reputed bounds of any survey or resurvey made and entered on record agreeably to the said recited Act, any large or overplus measures therein contained, notice as aforesaid given, deficiency of rights or other plea to the contrary, notwithstanding.

An Act passed 7th February, 1799, enacts:—

SECTION 1. All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin for taking away of goods and chattels, all actions of debt, founded upon any lending or contract, without specialty, or for arrearages of rent due on a parol demise, and all actions of account and upon the case, except actions for slander, and except also such actions as concern the trade or merchandise between merchant and merchant, their factors, agents, and servants, shall be commenced and sued within six years next after the cause of action shall have accrued, and not after.

SECT. 2. All actions of trespass for assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within \* four years next after the cause of such actions shall have [\* lxx] accrued, and not after.

SECT. 3. Every action upon the case for words shall be commenced and sued within two years next after the words spoken, and not after.

SECT. 4. *Provided always*, if any person or persons, who is, are, or shall be entitled to any of the actions specified in the three preceding sections of this Act, is, are, or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, *feme covert*, or insane, then such person or persons shall be at liberty to bring the said action so as he, she, or they institute or take the same within such time as is before limited, after his, her, or their coming to or being of full age, discover, or of sane memory, as by other person or persons having no such impediment might be done.

SECT. 5. Any prosecution hereafter to be had or commenced upon any bond, heretofore given by any sheriff and his securities, for the faithful performance of the office of sheriff, shall in no wise operate against, or in any manner affect, the said securities mentioned or bound in said bond.

unless such prosecution shall be commenced within six years after the passing of this Act; nor shall any prosecution, had or commenced upon any bond hereafter to be given by any sheriff and his securities as aforesaid, in any wise operate against or affect the said securities named and bound in said bond, unless such prosecution shall be commenced within nine years after the date of the said bond, and not after.

SECT. 6. Every action of debt, or covenant for rent or arrearages of rent, founded upon any lease under seal, whether indented or poll, and every action of debt upon any single or penal bill for the payment of money only, or upon any obligations, with condition for the payment of money only, or upon any award under the hands and seals of arbitrators for the payment of money only, shall be commenced and sued within sixteen years next after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, specialty, or award, within or after the said period of sixteen years, then action instituted on such lease, specialty, or award, within sixteen years after such payment, shall be good and effectual in law, and not after: *Provided always*, the time during which the person who is or shall be entitled to any of the actions specified in this section shall have been within the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of sixteen years.

SECT. 7. Judgments in any court of record of this State may be revived by *scire facias*, or an action of debt may be brought thereon, within twenty years next after the date of such judgment, and not after: *Provided*, the time during which the person who is or shall be entitled to the benefit of such judgment shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of twenty years.

[\* lxxi] \* SECT. 9. No person who now hath, or hereafter may have, any right or title of entry into any lands, tenements, or hereditaments, shall make any entry therein, but within twenty years next after such right or title shall accrue; and such person shall be barred from any entry afterwards: *Provided always*, the time during which the person, who hath or shall have such right or title of entry shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of twenty years.

SECT. 10. From and after the first day of January, which will be in the year of our Lord one thousand eight hundred and three, every real, possessory, ancestral, mixed, or other action, for any lands, tenements, or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after: *Provided always*, the time during which the person who hath or shall have such right or title, or cause of action, shall have been under the age of



twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of twenty years.

SECT. 11. If a mortgagee, and those under him, be in possession of the lands, tenements, and hereditaments contained in the mortgage, or any part thereof, for twenty years after default of payment by the mortgagor, then the right or equity of redemption therein shall be for ever barred.

SECT. 12. *Provided, nevertheless*, if in any of the said actions, specified in any of the preceding sections of this Act, judgment be given for the plaintiff, and the same be reversed by writ of error, or if a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, then the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after.

SECT. 13. No person or persons, bodies politic or corporate, shall be sued or impleaded by the State of New Jersey, for any lands, tenements, or hereditaments, or for any rents, revenues, issues, or profits thereof, but within twenty years after the right, title, or cause of action to the same shall accrue, and not after.

SECT. 14. The orphans' court of the proper county is hereby empowered to direct executors and administrators to give public notice to the creditors of the estate of the decedent, to bring in their debts, demands, and claims against the same, within such time as the said court shall limit and appoint, not exceeding two years, nor less than one year, by setting up such notice in five of the most public places in the said county, for the space of two months, and also by advertising the same, for the like space, in one or more of the newspapers in this State, and any further notice, in case such court shall judge the same necessary. And if any creditor shall neglect to exhibit his or her debt, demand, or claim within the time so limited, after public \* notice given as aforesaid, such creditor shall be for [\* lxxii] ever barred of his or her action therefor, against such executors or administrators: *Provided always*, the said executors and administrators, on the payment of any part of the decedent's estate to any legatee or person claiming distribution thereof, shall take bond to refund as heretofore, and within six months after the expiration of the time, so as aforesaid limited by the orphans' court for creditors to come in and claim, shall cause the same to be filed in the clerk's office of such orphans' court, for the use and benefit of such creditor or creditors as may not have come in and claimed; which said bond or bonds, on application to the said orphans' court and order thereupon, the said creditor or creditors may put in suit against such legatee, or person claiming distribution and their sureties, at his, her, or their own costs and charges, and for his, her, or their own use and benefit; but shall recover no costs thereupon.

SECT. 15. All actions or informations which shall be brought or exhibited for any forfeiture upon any penal statute made or to be made, whereby the said forfeiture is or shall be limited to the State of New Jersey only, shall be brought or exhibited within two years next after the offence committed or to be committed against such penal statute, and not after. And all actions or informations which shall be brought or exhibited for any forfeiture upon any penal statute made or to be made, the benefit and suit whereof is or shall be, by the said statute, limited or given to any person or persons who shall prosecute for the same, or to the State of New Jersey and to any other who shall prosecute in that behalf, shall be brought or exhibited by any person or persons who may lawfully pursue for the same as aforesaid, within one year next after the offence committed or to be committed against the said statute; and in default of such pursuit, that then the same shall be brought or exhibited for the State of New Jersey, at any time within one year after the termination of the aforesaid year, and not after. And all actions or informations which shall be brought or exhibited for any forfeiture or cause upon any statute made or to be made, the benefit and suit whereof is or shall be limited or given to the party aggrieved, shall be brought or exhibited within the space of two years next after the offence committed or to be committed, or cause of action accrued, and not after: *Provided always*, where any action or information is or shall be limited by any statute to be brought or exhibited within a shorter time than is limited by this section, then the said action or information shall be brought or exhibited within such shorter time so limited by such statute.

Supplement passed 21st February, 1820, enacts: — SECT. 1. If any person or persons, against whom there is or shall be any such cause of action as is specified in the first, second, third, fifth, sixth, and seventh sections of the Act to which this is a supplement, shall not be resident in this State when such cause of action accrues, or shall remove from this State after the same shall accrue, and before the time of limitation mentioned [\* lxxiii] in said \* section is expired, then the time or times during which such person or persons shall not reside in this State as aforesaid shall not be computed as part of the said limited period within which such action or actions are required to be brought as aforesaid; but the person or persons having, or who may have, such cause of action as aforesaid, shall be entitled to all the time mentioned in the said several sections, for bringing their said actions after the cause thereof shall accrue, exclusive of the time or times during which the person or persons liable to such actions shall be not resident in this State as aforesaid.

Supplement passed 21st February, 1829, enacts: — SECT. 1. From and after the passing of this Act, any prosecution hereafter to be had or com-

menced upon any bond heretofore given by any constable and his securities, for the true and faithful performance of all the duties enjoined on him as constable, shall in no wise operate against, or in any manner affect the said securities mentioned or bound in said bond, unless such prosecution shall be commenced within three years after the passing of this Act, nor shall any prosecution, had or commenced upon any bond hereafter to be given by any constable and his securities as aforesaid, in any wise operate against or affect the said securities named and bound in said bond, unless such prosecution shall be commenced within four years after the date of the said bond, and not after.

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 PENNSYLVANIA.

*Personal Actions. (Digest of Laws of Pennsylvania, 1837, p. 657.)*

SECTION 1. All actions of trespass *quare clausum fregit*, all actions of detinue, trover, and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants) all actions of debt, grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent, except the proprietaries quit rents, and all actions of trespass, of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the fifth and twentieth day of April, which shall be in the year of our Lord one thousand seven hundred and thirteen, shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or \* suit, and not after. And the said actions of trespass, [\* lxxiv] of assault, menace, battery, wounding, imprisonment, or any of them, within two years next after the cause of such actions or suit, and not after. And the said actions upon the case for words, within one year next after the words spoken, and not after.

SECT. 2. If, in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict passed for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, then, and in every such case, the party plaintiff, his heirs, executors, or administrators, as the case may require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or given against the plaintiff as aforesaid, and not after.

SECT. 3. In all actions of trespass *quare clausum fregit* hereafter to be brought, wherein the defendant or defendants shall disclaim, in his or their plea, to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass, before the action brought: whereupon, or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue; and if the said issue be found for the defendant or defendants, or if the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suit concerning the same.

SECT. 4. In all actions upon the case, for slanderous words, to be used or prosecuted by any person or persons, in any court within this province, after the said twenty-fifth day of April next, if the jury upon trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed do amount unto, without any further increase of the same.

SECT. 5. *Provided, nevertheless,* that if any person or persons, who is or shall be entitled to any such action of trespass, detinue, trover, replevin, actions of account, debt, actions for trespass, for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be, or, at the time of any cause of such action given or accrued, fallen, or come, shall be within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned, or beyond the sea, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are hereby before limited, after their coming to or being of full age, discoverture, of sound memory, at large, or returning into this province, as other persons.

#### *Possession of Real Property.*

[\* lxxv] \* SECTION 1. Whereas it is necessary for the quieting of estates, and for the greater security of real property, that provision should be made for the limitation of actions to be brought for any manors, lands, tenements, or hereditaments:

SECT. 2. From henceforth no person or persons whatsoever shall make entry into any manors, lands, tenements, or hereditaments after the expiration of twenty-one years next after his, her, or their right or title to the same first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right, or any other real or possessory writ or

action, for any manor, lands, tenements, or hereditaments, of the seisin or possession of him, her, or themselves, his, her, or their ancestors or predecessors, nor declare or allege any other seisin or possession of him, her, or themselves, his, her, or their ancestors or predecessors, than within twenty-one years next before such writ, action, or suit so hereafter to be sued, commenced, or brought.

SECT. 3. *Provided*, that any person or persons now having right, title of entry as aforesaid, and the heir or heirs of such person or persons, may, within fifteen years from this time, enter, or commence any action or suit, as he, she, or they, or his, her, or their ancestors or predecessors might have done before the passing of this Act.

SECT. 4. *Provided, also*, that if any person or persons having such right or title be, or shall be at the time such right or title first descended or accrued, within the age of twenty-one years, *feme covert, non compos mentis*, imprisoned [or beyond the seas, or from and without the United States of America], then such person or persons and the heir or heirs of such person or persons, shall and may, notwithstanding the said twenty-one years be expired, bring his or their action, or make his or their entry, as he, she, or they might have done, before the passing of this Act, so as such person or persons, or the heir or heirs of such person or persons, shall within ten years next after attaining full age, discoveriture, soundness of mind, enlargement out of prison [or coming into the said United States], take benefit of or sue for the same, and no time after the said ten years; and in case such person or persons shall die within the said term of ten years, under any of the disabilities aforesaid, the heir or heirs of such person or persons shall have the same benefit that such person or persons could or might have had, by living until the disabilities should have ceased or been removed; and if any abatement happen in any proceeding or proceedings upon such right or title, such proceeding or proceedings may be renewed and continued, within three years from the time of such abatement, but not afterward.

SECT. 5. No person or persons that now hath or have any claim to the possession of any lands, tenements, or hereditaments, or the pre-emption \* thereof, from the Commonwealth, founded upon any [\* lxxvi] prior warrant, whereon no survey hath been made, or in consequence of any prior settlement, improvement, or occupation, without other title, shall hereafter enter or bring any action for the recovery thereof, unless he, she, or they, or his, her, or their ancestors or predecessors, have had the quiet and peaceable possession of the same within seven years next before such entry, or bringing such action: *Provided always*, that if any person or persons so claiming as aforesaid hath been forced or driven away from his, her, or their possessions, by the savages, or by the terror of them, or any other persons, or by any other means, except by the judicial

authority of the State, hath quitted the same, during the late war, then such person or persons, and his, her, or their heir or heirs, shall or may, notwithstanding the said seven years be expired, bring his, her, or their action, or make his, her, or their entry within five years from the passing of this Act.

SECT. 6 relates to bills, indictments, and informations.

SECT. 7. No deed, grant, conveyance, or assurance heretofore given by any sheriff of any of the counties within this State, *bona fide*, and for a valuable consideration of any lands, tenements, or hereditaments whatsoever, where quiet and peaceable possession hath been had of the same for the space of six years, shall be adjudged or taken to be defective, avoided, or prejudiced, for not producing in court, upon trial or otherwise, any writ of *fieri facias*, *levari facias*, or *venditioni exponas*, or any return, thereupon, or for want of proof that due and legal notice of the sales of the same was given, or for not having been recorded in the office for recording of deeds.

*Supplementary Act directing the Descent of Intestates' Real Estate, &c.*

SECTION 1. Supplied by Act relating to Orphans' Court of 1832.

SECT. 2. In all cases where a return of *nulla bona* shall have been made by the sheriff of the proper county, to an execution against any such executors or administrators, their sureties shall, on notice thereof, unless they can show goods or chattels, lands or tenements, in some other county, which may be seized and taken in execution by a *testatum fieri facias*, to satisfy the same, be liable to pay the amount of the debt and costs therein, in actions brought against them on the said bonds, and such further proof or evidence in support thereof, as by law would have entitled the suitor or suitors to recover his, her, or their demand of the said executors or administrators, *de bonis propriis*: *Provided*, such suits shall be instituted against the sureties within seven years after the date of the respective bonds; and the whole amount of the sums of money to be recovered thereupon shall not exceed the penalties of the said bonds respectively.

SECT. 4. Whereas, inconveniences may arise from the debts of deceased persons remaining a lien on their lands and tenements, an indefinite period of time after their decease, whereby *bona fide* purchasers may be injured and titles becoming insecure: *Be it enacted*, that no such debts, [\*lxxvii] except they \* be secured by mortgage, judgment, recognizance, or other record, shall remain a lien on said lands and tenements longer than seven years after the decease of such debtor, unless an action for the recovery thereof be commenced and duly prosecuted against his or her heirs, executors, or administrators, within the said period of seven years, or a copy or particular written statement of any bond, covenant, debt,

or demand, where the same is not payable within the said period of seven years, shall be filed within the said period in the office of the prothonotary of the county where the lands lie: *Provided always*, that a debt due and owing to a person, who, at the time of the decease of such debtor, is a *feme covert*, in his or her minority, *non compos mentis*, in prison, or out of the limits of the United States, shall remain a lien on the said lands and tenements (notwithstanding the said term be expired), until four years after discovery, or such person shall have arrived at the age of twenty-one years, be of sound mind, enlarged out of prison, or return into some one of the United States of America.

*Judgment a Lien on Real Estate, and Suits against Sureties of Public Officers.*

Whereas, it is reasonable that persons entering into bonds or recognizances, as sureties for any public officers, should be exonerated from their responsibility within a reasonable term after such officers respectively shall die, resign, or be removed from office: Therefore, it shall not be lawful for any person or persons whomsoever, to commence and maintain any suit or suits on any bonds or recognizances, which shall hereafter be given and entered into by any person or persons, as sureties for any public officer, from and after the expiration of the term of seven years, to be computed from the time at which the cause of action shall have accrued; and, if any such suit or suits shall be commenced contrary to the intent and meaning of this Act, the defendant or defendants respectively shall and may plead the general issue, and give this Act, and the special matter in evidence; and, if the plaintiff or plaintiffs be nonsuit, or if a verdict or judgment pass against him or them respectively, the defendant or defendants shall respectively recover double costs.

*(Real Property. Supplement.)*

SECTION 1. The provision contained in the fourth section of the Act to which this is a supplement, so far as the same relates to persons beyond the seas, and from and without the United States of America, is hereby repealed, and the limitation contained in the second section of the said Act is hereby extended to persons residing beyond the seas, and from and without the United States of America, any law to the contrary notwithstanding.



## DELAWARE.

*Real Property. (Laws of Delaware, 1829.)*

[\* lxxviii] \* SECTION 1. From henceforth no person or persons whatsoever shall make an entry into any lands, tenements, or hereditaments, but within twenty years next after his, her, or their right or title first descended or accrued; nor shall any person or persons whatsoever have or maintain any writ of right or any action, real, personal, or mixed for, or make any prescription or claim to or in, any lands, tenements, or hereditaments, of the seisin or possession of him, her, or them, his, her, or their ancestor or predecessor, and declare or allege in any manner whatever any further seisin of him, her, or them, his, her, or their ancestor or predecessor, but only an actual seisin or possession of him, her, or them, his, her, or their ancestor or predecessor, of the premises sued for or claimed within twenty years next before such writ or action hereafter to be had or brought: *Provided, nevertheless*, that any person or persons now having right or title of entry and the heirs of such person or persons may within ten years from this time proceed as might have been done heretofore: *And provided, also*, that if any person having right or title of entry was and now is, or if any person hereafter having right or title of entry shall be at the time of such right or title first descended or accrued an infant, *feme covert*, *non compos mentis*, or a prisoner; then, but in no other case whatever, except as before provided, such person or the heirs of such person, may within ten years next after the removal of such disability, but not afterwards, proceed, notwithstanding the said twenty years be expired, as might have been done before the same were expired; and if any such person shall die under any of the disabilities aforesaid, the heirs of such person shall have the like benefit that such person might have had by living till the disability had ceased.

An Act concerning waste, &c., 1829, provides that no action of waste shall be brought after the expiration of three years from the committing of the waste, with the usual exceptions of infancy, &c.

An Act concerning mesne profits, passed February 6, 1829, provides, that when, after recovery in ejectment, action is brought for mesne profits; if such action be commenced within six months after the judgment, or if there be a writ of error, within six months after the affirmance of said judgment, or other determination of the proceeding in error, the said action shall, so far as to avoid the intermediate operation of the Act of limitation, be deemed a continuation of the proceeding in ejectment; so that the plaintiff shall not be debarred by the Act of limitation from recovering mesne profits for three years next preceding the commencement of the ejectment.

*Personal Actions.*

\* SECTION 1. No action shall be brought upon the official re- [\* lxxix] cognizance of any sheriff, or upon any administration bond, or upon any testamentary bond, against either the principal or sureties after the expiration of six years from the date of such recognizance or bond.

SECT. 2. No action shall be brought upon any guardian bond against either the principal or sureties after the expiration of three years from the determination or ceasing of the guardianship.

SECT. 3. No action shall be brought upon any recognizance taken in the orphans' court with condition for the payment of appraised value or of purchase-money of lands, tenements, or hereditaments, against any surety in such recognizance, or the heirs, terre-tenants, executors, or administrators of such surety, after the expiration of three years from the time when the value of money mentioned in the condition or the last instalment thereof (when it is payable by instalments) is payable.

SECT. 4. No action shall be brought upon the official obligation of any State Treasurer, Secretary of State, County Treasurer, Treasurer of the Trustees of the Poor, Coroner, Register for the probate of wills and granting letters of administration, Recorder of Deeds, Clerk of the Supreme Court, Prothonotary of the Court of Common Pleas, Clerk of the Peace, Clerk of the Orphans' Court, collector or constable, against either the principal or sureties, after the expiration of three years from the accruing of the cause of such action.

SECT. 5. No action of trespass, no action of replevin, no action of detinue, no action of debt not founded upon a record or specialty, no action of account, no action of assumpsit, and no action upon the case whatever, shall be brought after the expiration of three years from the accruing of the cause of such action: except that the time prescribed by the preceding limitation shall not begin to run in the case of a mutual and running account between parties, while such account continues open and current; and that when the cause of action arises from a promissory note, bill of exchange, or an acknowledgment under the hand of the party of a subsisting demand, the action may be commenced at any time within six years from the accruing of such cause of action.

SECT. 6. *Provided*, that if the person entitled to any action comprehended within either of the foregoing sections shall have been at the time of the accruing of the cause of such action under disability of infancy, coverture, or incompetency of mind, this Act shall not be a bar to such action during the continuance of such disability, nor until the expiration of three years from the removal thereof.

SECT. 7. No civil action for a forfeiture upon a penal statute, whether at the suit of the party grieved or of a common informer, or of the State or

[\* lxxx] \* otherwise, shall be brought after the expiration of one year from the accruing of the cause of such action.

SECT. 8. No action shall be brought upon any bond given to the president, directors, and company of any bank, or to any corporation in the State, by any officer of such bank or corporation with condition for his good behavior, or for the faithful discharge of his duties in his station, or touching the execution of his office, against either the principal or sureties, after the expiration of two years from the accruing of the cause of such action; and no action shall be brought, and no proceeding shall be had, upon any such bond or upon any judgment thereupon, against either the principal or sureties, for any cause of action accruing after the expiration of six years from the date of such bond.

The directors or managers of any bank or corporation are authorized and enjoined to take from each officer thereof, required by the charter or by-laws to give bond, a new bond as often as may be deemed expedient, but at furthest every six years, and so that the date of the new bond shall not be more than six years posterior to the date of the bond immediately preceding.

SECT. 9. *Provided*, that when a cause of action arises in this State, if the person liable to such action be not an inhabitant of this State at the accruing of such cause, or abscond or remove from this State before the expiration of the time allowed by this Act for bringing such action, the time during which such person shall have been out of this State, shall, in applying either of the limitations of this Act, be deducted; and in every such case at least one year from the return of such person into this State shall be allowed for bringing such action.

SECT. 10. *Provided, also*, that if, in any action judgment shall be rendered for the plaintiff, and the said judgment be afterwards reversed, or verdict be given for the plaintiff and judgment be arrested, or judgment be given against the plaintiff on a plea in abatement, or the plaintiff or defendant die after writ sued and before the defendant's appearance; a new action may be brought upon the same cause of action at any time within a year after said reversal, arrest, abatement, or death. This proviso, however, shall not avail, if the first action at the time of bringing it were barred by this Act; but if this Act were pleaded in the first action, and verdict thereupon found for the plaintiff, such verdict shall be conclusive evidence that the first action was not at the time of bringing it barred by this Act.

SECT. 11. No exceptions to an account of an executor, administrator, or guardian, settled by the register for the county, shall be received or filed in the orphans' court after the expiration of three years from the settlement of said account: *provided*, that this limitation, in respect to any person under disability of infancy, coverture, or incompetency of mind at the

time of the settlement of any such account, shall begin to run from the ceasing of such disability, and not from the time of such settlement.

SECT. 12. This Act shall extend and apply to all recognizances, bonds, \*obligations, and accounts herein mentioned, as [\*lxxxi] well as those that have been taken, executed, or settled heretofore, as those that shall be taken, executed, or settled hereafter, and to all actions and causes of action herein mentioned, as well those that have accrued heretofore, as those that shall accrue hereafter; saving only, that upon sheriff's recognizances taken before the first day of January, in the year of our Lord one thousand eight hundred and twenty-three, the period of limitation shall be seven years from the date of such recognizances, and upon official obligations of constables taken before the first day of January, in the year of our Lord one thousand eight hundred and twenty-seven, the period of limitation shall be four years from the date of such obligations; and this Act shall not be a bar to any action commenced before the first day of September, in the year of our Lord one thousand eight hundred and thirty, upon any recognizance taken in the orphans' court, or upon the official bond of any officer of a bank or corporation, or of a State Treasurer, Secretary of State, County Treasurer, Treasurer of the trustees of the poor, Collector, or for a cause of action arising from a promissory note, bill of exchange, or acknowledgment under the hand of the party of a subsisting demand.

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MARYLAND.

*Limitation of Certain Actions for avoiding Suits at Law. (Laws of Maryland, Vol. 1, Ch. 23.)*

Forasmuch as nothing can be more essential to the peace and tranquillity of this Province than the quieting the estates of the inhabitants thereof, and for the effecting of which no better measures can be taken than a limitation of time for the commencing of such actions, as in the several and respective courts within this Province are brought, from the time of such actions accruing :

SECT. 2. *Be it enacted, by the King's most excellent Majesty, by and with the advice and consent of his Majesty's Governor, Council, and Assembly of this Province, and the authority of the same, that all actions of trespass quare clausum fregit; all actions of trespass, detinue, sur trover, or replevin, for taking away goods or chattels; all actions of account, contract, debt, book, or upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants which are not residents in this Province; all actions of debt for lending*

or contract without specialty ; all actions of debt for arrearages of rent ; all actions of assault, menaces, battery, wounding, and imprisonment, or any of them, which shall be sued or brought by any person or persons within this Province, at any time after the end of this present session [\*lxxxii] of assembly, shall be \*commenced or sued within the time and limitation hereafter expressed, and not after ; that is to say, the said actions of account, and the said actions upon the case, upon simple contract, book debt, or account, and the said actions for debt, detinue, and replevin for goods and chattels, and the said action for trespass *quare clausum fregit*, within three years ensuing the cause of such action, and not after ; and the said actions on the case for words, and actions of trespass, of assault, battery, wounding, and imprisonment, or any of them, within one year from the time of the cause of such action accruing, and not after.

SECT. 3. *And be it further enacted, by the authority aforesaid*, that if any person entitled to any the action or actions aforesaid, shall be, at the time of any such cause of action accruing, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person or persons shall be at liberty to bring the said action or actions within the respective times before limited, after their coming to, or being of, full age, sound memory, at large, or returned from beyond the seas, as other persons having no such impediment might or should have done.

Ch. 216 repeals the savings in favor of persons beyond seas.

### *Real Actions and Replevin.*

The statute of 21 James I. c. 16, with its savings, is still in force in this State. 4 Griffith's Annual Law. Reg. 930.

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## SOUTHERN STATES.

### VIRGINIA.

#### *Real Actions. (Revised Code.)*

SECTION 1. *Be it enacted by the General Assembly*, that all writs of *formedon in descender*, remainder, or reverter, of any lands, tenements, or hereditaments whatsoever, hereafter to be brought upon any title or cause hereafter accrued, or which may hereafter fall or accrue, shall be sued out within twenty years next after such title or cause of action accrued, and not afterwards ; and that no person or persons, who now hath or have, or hereafter may have, any right or title of entry, into any lands, tenements, or hereditaments, shall make any entry but within twenty years next after

such right or title accrued; and such person shall be barred from any entry afterwards.

SECT. 2. *Provided, nevertheless*, that if any person or persons, entitled to such writ or writs, or to such right or title of entry as aforesaid, shall be, \* or were under the age of one and twenty years, [\*lxxxiii] *feme covert, non compos mentis*, imprisoned or not within this Commonwealth, at the time of such right or title accrued, or coming to them, every such person, and his or her heirs, shall and may, notwithstanding the said twenty years are or shall be expired, bring and maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled, and not afterwards.

SECT. 3. In all writs of right, and other actions possessory, any person may maintain a writ of right upon the possession or seisin of his ancestor or predecessor, within fifty years, or any other possessory action upon the possession or seisin of his or her ancestor or predecessor, within forty years next before the teste of the writ; but no person shall maintain a real action upon his own possession or seisin, but within thirty years next before the teste of the writ.

*Personal Actions, Computation of Time, &c.*

SECT. 4. All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, actions *sur trover*, and replevin for taking away of goods and chattels; all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of debt, grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought; shall be commenced and sued within the time and limitation hereafter expressed, and not after; that is to say, the said actions upon the case, other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods and chattels, and the said actions of trespass *quare clausum fregit*, within five years next after the cause of such action or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within three years next after the cause of such actions or suits, and not after; and the said action upon the case for words, within one year next after the words spoken, and not after.

SECT. 5. Judgments in any court of record within this Commonwealth, where execution hath not issued, may be revived by *scire facias*, or an action of debt brought thereon, within ten years next after the date of such judgment, and not after; or where execution hath issued, and no return is made thereon, the party in whose favor the same was issued shall and may obtain other executions, or move against any sheriff or other officer, or his

or their security or securities, for not returning the same, for the term of ten years from the date of such judgment, and not after.

SECT. 6. *Provided*, that if any person or persons, entitled to such judgment, where execution hath not issued, or where execution hath issued, and no return made (in either case), shall be, or were under [\* lxxxiv] the \* age of twenty-one years, *feme covert, non compos mentis*, imprisoned, or not within this Commonwealth, at the time of such judgment being awarded, whether execution hath issued thereon or not, every such person, his, or her heirs, executors, or administrators, shall and may, notwithstanding the said ten years are or shall be expired, have the benefit of said judgment, where no execution hath issued, by reviving the same by *scire facias*, or by action of debt; and where execution hath issued, and no return made, every such person or persons, his or her heirs, executors, or administrators, may have the benefit of other executions, or may move against any sheriff or other officer, or his or their security or securities, for the same, within five years after such disabilities removed, and not after.

SECT. 7. All actions or suits, founded upon any account for goods, wares, or merchandise sold and delivered, or for any articles charged in any store account, shall be commenced and sued within one year next after the cause of such action or suit, or the delivery of such goods, wares, and merchandise, and not after; except, that, in the case of the death of the creditors or debtors, before the expiration of the said term of one year, the further time of one year, from the death of such creditor or debtor, shall be allowed for the commencement of any such action or suit.

SECT. 8. And, to prevent imposition or deception herein, the respective time or date of the delivery of the several articles, charged in any such account, or any receipt taken for the delivery of them, shall be particularly specified. And if any merchant or trader shall wilfully post-date any article or articles in such account, or the receipt taken for the delivery of them, he shall forfeit and pay tenfold the amount of the article or articles, so post-dated, to be recovered, with costs, by warrant where the penalty does not exceed twenty dollars, and by action of debt or information in any court of record, where the penalty shall exceed that sum; to the informer, where the informer prosecutes, or to the Commonwealth, "for the use of the literary fund," where the prosecution shall be first instituted on the public behalf.

SECT. 9. And, to prevent any doubt in the construction hereof, it is hereby declared, that the before-mentioned limitation of one year shall take place and be computed from the respective dates or times of delivery of the several articles entered or charged in any such account; and that all such articles as shall have been of more than one year's standing, when the action or suit was commenced, shall be disallowed and rejected, and



verdict shall be given or judgment rendered, for no more than the amount of such articles, as appear to have been actually charged or delivered within one year next before the commencement of the suit as aforesaid.

SECT. 10. *Provided, nevertheless*, that if, in any of the said actions or suits, judgment be given for the plaintiff, and the same be afterwards reversed by error, or a verdict pass for the plaintiff and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take \* nothing by his plaint, writ, or bill, in all such [\*lxxxv] cases, the party plaintiff, his heirs, executors, or administrators (as the case shall require) may commence a new action or suit, from time to time, within one year next after such judgment reversed, or such judgment given against the plaintiff, and not after.

SECT. 11. *Provided always*, that in all questions which may arise in any court of record, upon any Act for limitation of actions, making entries into lands, or limitation of evidence, in the computation of time, the several periods between the twelfth day of April, one thousand seven hundred and seventy-four, and the twelfth day of April, one thousand seven hundred and seventy-eight, and between the first day of January, one thousand seven hundred and eighty-one, and the fifth day of January one thousand seven hundred and eighty-two, and between the fifth day of May, one thousand seven hundred and eighty-three, and the twentieth day of October, in the same year, shall not be accounted any part thereof, so as to bar such action, entry, or evidence.

SECT. 12. *Provided, also*, that if any person or persons, that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, be, or shall be, at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, beyond the seas, or out of the country, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to, or being of full age, discover, of sane memory, at large, and returned from beyond the seas, or from without this country, as by other persons having no such impediment should be done.

SECT. 13. *Provided always*, that all suits hereafter brought in the name or names of any person or persons, residing beyond the seas, or out of this country, for recovery of any debt due for goods actually sold and delivered here, by his or their factor or factors, shall be commenced and prosecuted within the time appointed and limited by this Act, for bringing the like suits, and not after; notwithstanding the saving herein before contained to persons beyond the seas at the time their causes of action accrued;

*Provided, nevertheless,* that if any factor shall happen to die before the expiration of the time in which suit should have been brought, such principal shall be allowed two years from the death of such factor, to commence and prosecute his, her, or their action for any debt due to him, her, or them, on account of any contract or dealing with such factor.

SECT. 14. *Provided also,* that if any person or persons, defendant or defendants to any of the aforesaid actions, shall abscond or conceal themselves, or, by removal out of the country, or the county, where he or they do or shall reside, when such cause of action accrued, or by any other indirect ways or means defeat or obstruct any person or persons, [\* lxxxvi] who have title \* thereto, from bringing or maintaining all, or any of the aforesaid actions within the respective times limited by this Act, that then, and in such case, such defendant or defendants are not to be admitted to plead this Act in bar to any of the aforesaid actions; any thing in this Act in any wise to the contrary notwithstanding.

SECT. 15. *Provided, also,* that this Act shall not extend to any action which shall be commenced against any master or commander of a ship or vessel, who shall discharge or cause to be put on shore any sick or disabled sailor belonging to his ship or vessel, or any servant, without taking due care for their maintenance and cure, or carrying any debtor, servant, or slave out of this Commonwealth, contrary to law.

SECT. 16. If any suit be brought against any executor or administrator, "or other person having charge of the estate of a testator or intestate," for the recovery of a debt due upon an open account, it shall be the duty of the court, before whom such suit shall be brought, to cause to be expunged from such account every item thereof which shall appear to have been due five years before the death of the testator or intestate; saving to all persons *non compos mentis, femes covert*, infants, imprisoned, or out of this Commonwealth, who may be plaintiff in such suits, three years after their several disabilities "shall be" removed. And, if any person shall wilfully post-date any such account, he shall forfeit and pay tenfold the amount of the articles so post-dated, to be recovered in any court of record, where the penalty incurred shall exceed twenty dollars, and by a warrant, before a justice of the peace, where the penalty incurred shall not exceed that sum.

SECT. 17. No action of debt shall be brought against any executor or administrator, "or other person having charge of the estate of a testator or intestate," upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or administrator, "or other person having charge of the estate as aforesaid," to revive such judgment, after the expiration of five years from the qualification of his executor or administrator, "or of such other person having charge of the estate;" and all such judgments, after the expiration of five years, upon

which no proceedings shall have been had, shall be deemed to have been paid and discharged; saving to all persons *non compos mentis*, *femes covert*, infants, imprisoned, or out of this Commonwealth, who may have been entitled to the benefit of such judgment, three years after their several disabilities are removed.

SECT. 18. No bill of review shall be granted by any corporation or county court sitting in chancery, or by any superior Court of Chancery, to any decree pronounced in a cause which shall be finally decided, unless the same be applied for within three years next after such final decision; saving to infants, *femes covert*, persons of insane mind, "persons imprisoned," and persons out of the State, in the service of this State, or of the United States, \* a right to obtain such bill of re- [\*lxxxvii] view, within three years after their respective disabilities are removed.

SECT. 19. No writ of error or *supersedeas* shall be granted to any judgment of a court of law, after the expiration of five years from the time when such judgment shall have been made final; saving to all persons *non compos mentis*, infants, *femes covert*, persons imprisoned or out of the United States, in the service thereof, or of this State, three years after their several disabilities removed.

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NORTH CAROLINA.

*Real Property. Revised Statutes.*

SECTION 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same*, that no person or persons, nor their heirs, which hereafter shall have any right or title to any lands, tenements, or hereditaments, shall thereunto enter or make claim, but within seven years next after his, her, or their right or title descended or accrued, and in default thereof such person or persons, so not entering or making claim, shall be utterly excluded and disabled from any entry or claim thereafter to be made: *Provided, nevertheless*, that if any person or persons, that is, or hereafter shall be, entitled to any right or claim of lands, tenements, or hereditaments, shall be, at the time the said right or title first descended, accrued, come, or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, that then such person or persons shall and may, notwithstanding the said seven years be expired, commence his, her, or their suit, or make his, her, or their entry, as he, she, or they might have done before this Act, so as such person or persons shall, within three years next after full age, dis-

coverture, coming of sound mind, enlargement out of prison, or persons beyond seas, within eight years after the title or claim becomes due, take benefit and sue for the same, and at no time after the times or limitations herein specified; but that all possessions, held without suing such claim as aforesaid, shall be a perpetual bar against all, and all manner of persons whatsoever, that the expectation of heirs may not, in a short time, leave much land unpossessed, and titles so perplexed, that no man will know of whom to take or buy land. *Provided, also*, that if, in any action of ejectment for the recovery of any lands, tenements, or hereditaments, judgment be given for the plaintiff, and the same be reversed for error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his plaint, writ, or bill, or a verdict be given against the plaintiff, in all [\* lxxxviii] such cases the party plaintiff, his heirs or executors, as \* the case shall require, may commence a new action or suit from time to time, within one year after such judgment reversed, or judgment given against the plaintiff.

SECT. 2. Where any person or persons, or the person or persons under whom he, she, or they claim, shall have been, or shall continue to be, in possession of any lands, tenements, or hereditaments whatsoever, under titles derived from sales, made either by creditors, executors, or administrators of any person deceased, or by husbands and their wives, or by indorsement of patents or other colorable title, for the space of twenty-one years, all such possessions of lands, tenements, or hereditaments, under such title, shall be and are hereby ratified, confirmed, and declared to be a good and legal bar against the entry of any person or persons, under the right or claim of the State, to all intents and purposes whatsoever: *Provided, nevertheless*, that the possession so set up shall have been ascertained and identified under known and visible lines or boundaries.

#### *Personal Actions.*

SECT. 3. All actions of trespass, detinue, actions *sur trover*, and replevin for taking away of goods and chattels, all actions of account and upon the case, all actions of debt for arrearages of rent, all actions of debt grounded upon any lending or contract without specialty, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought, shall be commenced or brought within the time and limitation in this Act expressed, and not after; that is to say, actions of account rendered, actions upon the case, actions of debt for arrearages of rent, actions of debt upon simple contract, actions of detinue, replevin, and trespass either for goods and chattels or *quare clausum fregit*, within three years next after the cause of such action or suit, and not after; except such

accounts as concern the trade of merchandise, between merchant and merchant, and their factors or servants; and the said actions of trespass, of assault and battery; wounding, imprisonment, or any of them, within one year after the cause of such action or suit, and not after; and the said actions upon the case for words, within six months after the words spoken, and not after.

SECT. 4. *Provided, nevertheless*, that if, on any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or, if any of the said actions shall be brought by original writ, and the defendant cannot be attached or legally served with process, in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or till the defendant can be attached or served with the process, so as to compel him to appear and \*answer. *And provided, further*, that if any per- [\*lxxxix] son or persons, that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of accompt and upon the case, actions of debt for arrearages of rent, actions of debt grounded upon any lending or contract without specialty, actions of assault, menace, battery, wounding, and imprisonment, actions of trespass *quare clausum fregit*, actions upon the case for slanderous words, be, or shall be, at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they bring the same within such times as are before limited, after their coming to or being of full age, discover, of sound memory, at large, or returned from beyond seas, as other persons having no such impediment might have done. *And provided, further*, that when any person or persons, against whom there is cause of action, shall be beyond sea at the time of such cause of action given or accrued, fallen or come, the person, who shall have such cause of action, may bring his account against them within such time or times, as are hereinbefore limited, for bringing such actions after their return.

SECT. 5. The limitation of actions shall apply to all bonds, bills, and other securities made transferable by law, after the assignment or indorsement thereof, in the same manner as it operates against promissory notes.

SECT. 6. All actions and suits to be brought on any penal Act of the General Assembly, for the recovery of the penalty therein set forth, shall be brought within three years after the cause of such action or suit shall or may have accrued, and not after; *Provided*, that this Act shall not affect

the time of bringing suit on any penal Act of the General Assembly, which hath a time limited therein for bringing the same.

SECT. 7. If any orphan coming to the age of twenty-one years does not call on his or her guardian within three years from thence, for a full settlement of his guardianship, the securities of such guardian shall be discharged from their securityship, in as full and ample manner as if such security had not been bound: *Provided*, that nothing in this section shall extend to persons imprisoned, beyond the seas, or *non compos mentis*, so that they bring their action within three years after such disability be removed.

SECT. 8. All suits on the bonds of sheriffs, constables, clerks of the superior courts of law, clerks and masters in equity, and clerks of the courts of pleas and quarter sessions, shall be commenced and prosecuted within six years after the right of action shall have accrued, and not afterwards; saving, nevertheless, the right of infants, *femes covert*, and persons *non compos mentis*, so that they sue within three years after their disabilities are removed.

SECT. 9. All fees which now are or hereafter may become due [\* xc] to the \* clerk of any court of record within this State, or to any sheriff, or any other officer, by sentence, judgment, or decree of any court aforesaid, shall be collected, or suit commenced therefor, within three years from the time of such judgment rendered without an execution issued thereon, or within three years from the issuing of the last execution, and not after: *Provided*, nevertheless, that this section shall not extend to fees which may be due and owing from persons residing out of this State.

SECT. 10. All actions of debt, grounded upon the judgment of a justice of the peace, shall be commenced or brought within seven years next after the rendition of such judgment or the teste of the last execution, lawfully issuing on the same, and not after: *Provided*, nevertheless, that if any person or persons, that is or shall be entitled to any action of debt upon such justice's judgment, shall be, at the rendition of such judgment or teste of the last execution lawfully issuing on the same, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond seas, that then such person or persons shall be at liberty to bring said action, within three years after arriving at full age, discoverture, or coming of sound mind, or returning from beyond sea.

SECT. 11. Creditors of any person deceased shall make their claim within seven years after the death of such debtor, otherwise such creditor shall be for ever debarred.

SECT. 12. The creditor or creditors of any person deceased, if he or they reside within this State, shall within two years, and if they reside without the limits of this State, shall within three years from the qualification of the executors or administrators, exhibit and make demand of their respective accounts, debts, and claims of every kind whatsoever, to such



executors or administrators ; and if any creditor or creditors shall hereafter fail to demand and bring suit for the recovery of his, her, or their debt, as above specified, within the aforesaid limited time, he, she, or they shall for ever be barred from the recovery of his, her, or their debt, in any court of law and equity, or before any justice of the peace within this State: *Provided*, that nothing in this Act shall extend to debar infants, persons *non compos*, or *femes covert* to bring their several actions after the expiration of the term above mentioned: *Provided*, such action be brought within one year after the coming to lawful age, sound mind, or discoverture of such persons: *Provided, also*, that if any creditor, after making demand of his debt or claim, shall delay to bring suit at the special request of the executors or administrators, then and in that case the said debt or demand shall not be barred during the time of their indulgence: *And provided, also*, that the executor or administrator shall have advertised within the time and in the manner prescribed by law.

SECT. 13. The presumption of payment or satisfaction on all judgments, contracts, and agreements heretofore had or made, or hereafter to be had or made, shall arise within ten years after the right of action on the same \* shall have accrued, or shall accrue, under the same rules, [\* xci] regulations, and restrictions as now exist at law in such cases.

SECT. 14. The presumption of payment, or abandonment of the right of redemption on mortgages and of other equitable interests, shall arise within ten years after the forfeiture of said mortgage or last payment on the same, or the right of action shall have accrued or shall accrue on any equitable interest or claim, under the like rules, regulations, and restrictions: *Provided*, that when the right of action or claim on any judgment, contract, agreement, mortgage, or other equitable interest heretofore had or made, accrued more than ten years ago, the presumption of payment, satisfaction, or abandonment of the claim or right shall arise within thirteen years from the accrual of the right of action on the same, under the like rules, regulations, and restrictions.

SECT. 15. No *scire facias* shall be sued out or prosecuted against the bail of a defendant to any judgment or final decree, now existing in any court, but within four years from the rendition of such judgment, or the entering of such final decree.

SECT. 16. No *scire facias* shall be sued out or prosecuted against the bail of any defendant to any writ, or action, or suit, now pending, or hereafter to be brought in any of the courts in this State, but within four years after the rendition of a final judgment, or the entering of a final decree in the action or suit to which bail is or shall be given: *Provided, however*, that if the plaintiff in the action or suit aforesaid shall marry or die, after a judgment has been rendered or a final decree entered, and it shall therefore become necessary for his or her representative or husband to be made



a party to said judgment or decree, before execution thereon can be had, or if the plaintiff to any judgment or decree, now existing, be dead or married, and thereby a like necessity is created, the time which elapses during the pendency of the proceedings that may be had to revive the said judgment or decree shall not be reckoned: *Provided, nevertheless*, that if any person that is plaintiff in any judgment or decree, already rendered in any court of this State, shall be now an infant under the age of twenty-one years, a *feme covert*, *non compos mentis*, imprisoned, or beyond seas, then such person shall be at liberty to sue out and prosecute a *scire facias* upon the bail bond aforesaid, if he or she sue out the same within four years after his or her coming to or being of full age, discover, of sound memory, at large, or returned from beyond seas; and that if any person that shall be a plaintiff in any judgment or decree, that shall be hereafter rendered, be at the time of rendering the said judgment or entering up the decree, an infant under the age of twenty-one years, a *feme covert*, *non compos mentis*, imprisoned, or beyond seas, then such person or persons shall be at liberty to sue out and prosecute a *scire facias* upon the bail bond aforesaid, if he, she, or they sue out the same within four years after his, her, or their coming to or being of full age, discover, of sound memory, at large, or returned from beyond seas.

[\* xcii] \* SECT. 17. If the plaintiff shall sue out his *scire facias*, upon the bail bond as aforesaid, and shall be therein nonsuited, or obtain judgment against the bail, and such judgment shall be arrested or reversed for error, the time which elapses from the day of issuing such *scire facias*, to the nonsuit, or arrest of judgment, or reversal for error, shall not be reckoned under this Act.

SECT. 18. Whenever any person or persons shall remain in the possession of a slave or slaves, until such possession is protected by the statute of limitations, the person or persons so in possession, and those claiming under them, shall be deemed and held to have a good and absolute title to such slave or slaves, against all persons whose claim is barred by the said statute: *Provided*, that nothing herein contained shall in any way affect the law now in force that requires all gifts of slaves to be by deed of gift.

SECT. 19. Whenever any mortgagor or mortgagors in any mortgage of personal property, executed since the year one thousand eight hundred and thirty, or hereafter to be executed, or his, her, or their legal representative or representatives, shall fail to perform the conditions of the mortgage, for the space of two years from the time of performance specified in the mortgage, and shall omit to file a bill in equity, claiming his, her, or their equitable right to redeem such personal property, for the space of two years after the forfeiture of the conditions of the mortgage, he, she, or they shall be held and deemed for ever barred of all claim in equity to the personal property mortgaged as aforesaid: *Provided, nevertheless*, that nothing herein

contained shall be construed to prevent any mortgagee or mortgagees from filing his, her, or their bill in equity, to foreclose any such mortgage, at any time after the forfeiture of the condition specified in the mortgage: *And provided, further*, that if any such mortgagor or mortgagors shall become lunatic, or *non compos mentis*, or removed beyond seas, he, she, or they shall be allowed the further time of one year from the removal of such disability, within which he, she, or they, or his, her, or their legal representative or representatives may assert in equity his, her, or their right to redemption.

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SOUTH CAROLINA.

*Real Property. (Statutes at Large, Act of 1712.)*

SECTION 1. That all possessions of, or titles to, any lands, tenements, or hereditaments whatsoever, within this Province, derived from any grant from the lords proprietors or the persons authorized by them to take and sign grants for lands, or from any settlements, or deeds of gift for the same, or from any sales or other conveyances of the same, for lawful or valuable \* considerations, made either by the executors [\* xciii] of any person deceased, or any other persons lawfully empowered to sell the lands of the deceased, or by husbands in right of their wives, the wife joining in the conveyance if the right or inheritance of the lands were in the wife, or by indorsement of patents, or by any decree in chancery, or by any last will or testament, or by any other lawful conveyance or assurance in the law whatsoever; and, also, where the person or persons now in the possession of the said lands, tenements, or hereditaments within this Province, do possess, hold, and claim the same as of his, her, or their proper right, in fee-simple, and the person or persons so in possession, or the person or persons under whom they claim, have been quietly possessed, and without lawful interruption enjoyed the same severally or successively, for the space of seven years last past; that such person or persons so in possession as aforesaid shall have good right and title to the same, and shall have, hold, and enjoy the said lands, tenements, and hereditaments, unto him or them, his or their heirs or assigns, for ever, in fee-simple, against all and every person or persons whatsoever, excepting any person or persons beyond the seas, or out of the limits of this Province, or their assigns, or who claims under such persons, or derive their titles from them, or *feme covert*, or imprisoned: *Provided*, they prosecute their respective titles and claims within three years after the ratification of this Act. And all actions and process hereafter to be brought by them, or any of them, for the same, are hereby excluded and for ever debarred: *And also excepted*, any person or persons that are under the age of twenty-one

years, who shall be allowed to prosecute their claims, at any time within two years after they come to age, and if beyond the seas, three years.

SECT. 2. *And be it further enacted* by the authority aforesaid, that if any person or persons to whom any right or title to lands, tenements, or hereditaments within this Province shall hereafter descend or come, do not prosecute the same within five years after such right or title accrued, that then he or they, and all claiming under him and them, shall be for ever barred to recover the same, excepting any person or persons beyond the seas, or out of the limits of this Province, *feme covert*, or imprisoned, who shall be allowed the space of seven years to prosecute their right or title, or claim to any lands, tenements, or hereditaments in this Province, after such right and title accrued to them or any of them, and at no time after the said seven years; *and also excepted*, any person or persons that are under the age of twenty-one years, who shall be allowed to prosecute their claims at any time within two years after they come of age, and if beyond the seas, three years.

SECT. 3. And for the prevention of all disputes that may arise, how claims are to be made to lands and tenements in this Province, and that the same may be ascertained, and the possessors of lands and tenements assured how and in what manner persons having or laying claim to any lands or tenements ought to lay claim to the same, and also that all [\*xciv] persons having \*right or title to lands or tenements may know how to claim or demand their right in such cases, *Be it enacted* by the authority aforesaid, that all manner of persons whatsoever that are concerned to make claim to any lands or tenements within this Province, so as to make their claim effectual, or to make claim by their action of law, duly entered in the Court of Common Pleas, within this Province, according to the former practices and rules of the said court; and that the chief justice or judge of the said Court of Common Pleas do allow of no other claim to lands or tenements for any persons, plaintiffs in any suit or suits before him, than what is made by their action on record, as aforesaid, any law, usage, custom, or practice to the contrary notwithstanding.

SECT. 4. And whereas persons having or pretending right and title to lands and tenements in the possession of others, having once made their claim within the time limited and appointed by this act, may endeavor for ever after to keep their pretence of right or title to the same, by bringing their action or actions by way of claim at law, once in five years, and so again in five years after, and so vex and trouble the persons in possession in such manner for ever; for the prevention and removal of which inconveniences, *Be it further enacted* by the authority aforesaid, that all persons whatsoever that shall hereafter make their claim to any lands or tenements within the time limited by this Act, and bring their action for the same, shall proceed upon the said action with that convenient expedition that

the nature of the proceeding and the rules and practices of the court will permit, and shall not delay the same, but by special order or rule of the court, and shall bring the said action to trial; and in case the verdict and judgment are against the plaintiff, or that he discontinue his action, or suffer a nonsuit, or any other ways let fall that action or suit, that such trial and judgment thereupon, or discontinuance, nonsuit, or other letting fall the action or suit as aforesaid, shall be conclusive and definitive on the plaintiff's part for ever, and never to bring any action after that for the same, but to be for ever barred, any law, usage, custom, or practice to the contrary notwithstanding.

SECT. 5. *And be it further enacted* by the authority aforesaid, that not only the persons which have not made their claim to any lands or tenements in this Province, within the time limited by this Act, shall be barred, but also that all manner of persons whatsoever, that shall at any time claim under such person or persons who have lost their claim, shall be in like manner barred by this Act, and that this Act, and such clause or clauses in the same as relate to the matters aforesaid, may be given in evidence to a jury upon a trial of any claim, matter, or right to any lands or tenements in question, between party and party, and that the chief justice or judge of the Court of Common Pleas upon all such trials shall accept the same in evidence, so far as the same shall concern the said matter in difference.

Act of 1744 repeals the fourth section of the above Act of 1712, and allows the plaintiff or demandant in ejectment to bring more than one action \*for the recovery of any lands; with a saving of per- [\* xcv] sons beyond seas or out of the Province, who are allowed four years, and *feme coverts* and infants, who are allowed two years after discovery and coming to full age.

By Act of 1788, persons under age are allowed five years to prosecute a title to land, after coming of age.

By Act of 1824, the second section of the above Act of 1712 is altered so as to extend the time for the prosecution of a right or title to land to ten years. Also, by the same Act, the statute of limitations shall not thereafter be construed to defeat the rights of minors, when the statute has not barred the right in the lifetime of the ancestor, before the accrual of the right of the minor.

*Personal Actions and Limiting Claims to Land of Persons Non Compos.*  
(Act of 1712.)

SECT. 6. *And be it further enacted* by the authority aforesaid, that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action *sur trover*, and replevin, for taking away of goods and chattels, all actions of account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or

servants), all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent reserved by indenture, all actions of covenants, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the ratification of this Act, shall be commenced and sued within the time and limitation hereafter expressed; and not after: that is to say, the said actions upon the case other than for slanders, and the said actions for accounts, and the said actions for trespass, debt, detinue, and replevin for goods and chattels, the said actions of covenant, and the said actions of trespass *quare clausum fregit*, within three years next after the ratification of this Act, or within four years next after the cause of such actions or suits, and not after; and the said actions of trespass, of assault and battery, wounding, imprisonment, or any of them, within one year next after the ratification of this Act, or within one year next after the cause of such actions or suits, and not after; and the said actions upon the case of words, within six months after the ratification of this Act, or within six months next after the words spoken, and not after.

SECT. 7. And, nevertheless, be it enacted by the authority aforesaid, that if in any the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he takes nothing by his plaint, writ, or bill; or if any of the said actions shall be brought by original, and the defendant shall be outlawed therein, and shall after reverse the outlawry, that in all [\* xcvi] such cases \* the party plaintiff, his heirs, executors, and administrators, as the case shall require, may commence a new action or suit from time to time, within one year after such judgment reversed, or judgment given against the plaintiff, or outlawry reversed, and not after.

SECT. 8. *And be it further enacted* by the authority aforesaid, that in all actions of trespass *quare clausum fregit*, hereafter to be brought, wherein the defendent or defendants shall disclaim in his or their plea to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass, before the action brought, whereupon or upon some of them the plaintiff or plaintiffs shall be enforced to join issue, and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suit concerning the same.

SECT. 9. *And be it further enacted* by the authority aforesaid, that in all actions upon the case for slanderous words, to be sued or prosecuted by

any person or persons in any court of this Province, that hath power to hold pleas of the same, after the ratification of this Act, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same, any law, statute, custom, or usage to the contrary in any wise notwithstanding.

SECT. 10. *Provided, nevertheless,* and be it further enacted, that if any person or persons is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of accounts, actions of debts, covenant, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, at the time of any such cause of action given or accrued, shall be beyond the seas, or *feme covert*, or imprisoned, shall be at liberty to bring their action at any time within four years after the ratification of this Act, or at any time within five years after such cause of action given or accrued, and at no time after; and also excepting any person or persons that are under the age of twenty-one years, who shall be allowed to bring their action at any time within two years after they come to age, and if beyond the seas, three years.

SECT. 11. *And be it further enacted* by the authority aforesaid, that as to all penalties and forfeitures mentioned in any statute or act now in force in this Province, wherein a particular time is not mentioned in the said statutes or Acts, for the suing for the said fines and forfeitures by civil process, by action of debt, plaint, or information, that the same shall be prosecuted \* within six months after the cause of action or suit [\* xcvii] given, and not after.

SECT. 12. *Enacted,* that any person that hath cause of action against any executor or administrator, in all cases whatsoever shall bring their action within two years after the death of the testator, or within two years after cause of action.

SECT. 13. *And whereas* it is very necessary to secure all executors or administrators that have formerly acted as such in this Province, that a time may be limited for bringing any action or actions, demand or demands, from any person whatsoever, *Be it enacted* by the authority aforesaid, that after the ratification of this Act, in case any person or persons to whom the deceased is indebted, or hath any manner of demand, claim, right, or cause of action whatsoever, against the said executors or administrators, be it by judgment, recognizance, or other debts of record, or by debt upon any bond or obligation, or other specialty, or by covenant, or by account or book debt, or any cause whatsoever, shall make his or their demand by some legal process, suit, or action, within two years, if resident in this Province, and in case beyond the seas, three years, and no longer; infants only excepted,



who shall have two years after they come of age, if resident here, and if beyond the seas, three years, and no longer, any thing in this Act to the contrary notwithstanding.

SECT. 14. *And be it further enacted* by the authority aforesaid, that any person or persons, or any person for their use, are now actually in the possession of any negroes, plate, gold and silver, or any goods and chattels whatsoever, which were sold and actually delivered to him or them by any person, by bill of sale, by way of mortgage with right of redemption, under the proviso or provisos mentioned in the said bill of sale, and upon breach of the said proviso or provisos, or any of them, whereby the said negroes, plate, goods, or chattels became forfeited, and so of right by the said bill of sale do belong to the person or persons now in possession of the same, or his executors, administrators, or assigns, and that the person or persons who should have redeemed the same, neglected the payment of the money, or other legal satisfaction for the redemption thereof, according to the proviso of the bill of sale, for the space of seven years from the time of the breach of such proviso, he or they so neglecting to redeem the things mortgaged as aforesaid, and all other persons neglecting to claim the same, and all persons claiming under them, shall be debarred and for ever foreclosed from any right or equity of redemption whatsoever, and the right and property of the said negroes, plate, gold and silver, goods or chattels, so mortgaged and not redeemed within the time aforesaid, shall be vested in the said person or persons to whom the mortgage was so made, or their assigns to hold to them, their executors, administrators, and assigns, as their own proper goods and chattels for ever, without being subject to any right or equity of redemption whatsoever.

[\* xcviii] \* SECT. 15. *And be it further enacted* by the authority aforesaid, that in all bills of sale hereafter to be made of any negroes, plate, gold and silver, or goods and chattels whatsoever, by way of mortgage, with right of redemption upon performance of the proviso in the said bill of sale, and that the negroes, plate, gold and silver, or goods and chattels, are actually delivered unto the person unto whom such bill of sale is made, and are in his actual possession (and not a delivery or seisin in form of law only), and shall continue in the same for the space of two years after the breach of the proviso in the said bill of sale, without redemption thereof, the said goods or chattels so sold and delivered and possessed as aforesaid, though with right or equity of redemption, are hereby declared to be vested in the said person or persons to whom such bill of sale was made, and their executors, administrators, and assigns, to have and to hold to them, their executors, administrators, and assigns, as their own proper goods and chattels for ever; excepting such person or persons having such right or equity of redemption be beyond the seas, or otherwise out of the limits of this Province, or a *feme covert*, all which persons shall have saved



to them their equity of redemption, so as they prosecute the same within three years after the breach of the proviso of the bill of sale, and at no time after.

SECT. 16. And whereas, by this Act, a person being a *feme covert* is limited as to the time of laying claim to lands or tenements, and to commencing actions or suits of law, and not excepted generally until discovery, and that such person may be no way prejudiced by the same, *Be it further enacted* by the authority aforesaid, that in case any *feme covert* have any right or claim to any lands or tenements within this Province, or any other action or suit whatsoever, such *feme covert* shall have power to constitute an attorney under her hand and seal, to prosecute such her claim, action, or suit, either in her own name, or in the name of her husband and self, as if her husband had joined with her in such power of attorney; and such persons so constituted shall have power to prosecute such suit or claim to effect, and her husband shall not have power to abate, discontinue, or release her claim or action, without her voluntary consent given in open court, and recorded in the proceedings; neither shall such suit or action be any way abated upon the account of such woman being under coverture, but the proceedings shall be in all things as good and effectual in law as if such woman was sole, or her husband joined with her in such suit; any law, statute, Act, usage, or custom in this Province to the contrary notwithstanding.

SECT. 17. *Provided*, nevertheless, and be it enacted by the authority aforesaid, that in case any person or persons that have any right or claim to any lands or tenements in this Province, or to any action, suits, claims, or demands whatsoever, before limited by this Act, for the making, bringing, or commencing the same, excepting in suits to be brought or prosecuted against executors or administrators, or in the case of redeeming any goods or chattels \* mortgaged as aforesaid, and shall at the [\* xcix] time of such right or claim, or cause of action given or accrued, be *non compos mentis*, that in such case such person, notwithstanding the several limitations abovesaid, shall have liberty at any time to make his claim or bring his action or suit, except as before excepted, so as he do the same within one year after coming of sound mind, if resident in this Province, and within two years if beyond the seas, or otherwise out of the limits of this Province, and at no time after.

The clause in the above Act allowing but two years after death of the testator or cause of action, to sue executors or administrators, repealed by Act of 1731.

By Act of 1788, four years allowed to persons under age to prosecute personal actions after attaining full age.

## GEORGIA.

*Real and Personal Actions. (Digest of Laws of Georgia, 1837.)*

SECTION 1. *Be it enacted*, that all writs of *formedon in descender*, *formedon in remainder*, and *formedon in reverter*, of any lands, tenements, or hereditaments, or any other writ, suit, or action whatsoever, at any time hereafter to be sued or brought, by occasion or means of any title or cause heretofore accrued, happened, or fallen, or which may hereafter descend, happen, or fall, shall be sued and taken within seven years next after the passing of this Act, or after the title or cause of action shall or may descend or accrue to the same, and at no time after the said seven years; and that no person or persons that now hath or have, or which hereafter may have, any right or title of entry into any lands, tenements, or hereditaments, shall at any time hereafter make any entry, but within seven years next after the passing of this Act, or after his or their right or title shall or may descend or accrue to the same; and in default thereof, such persons so not entering, and their heirs, shall be utterly excluded and disabled from such entry after to be made: *Provided, nevertheless*, that if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of such right or title first descended, accrued, come, or fallen, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said seven years are expired, bring his, her, or their action, or make his, her, or their entry, as he, she, or they might have done before this Act, so as such person and persons, or his, her, or their heir and heirs, shall, within three years next after his, her, or their [\*c] full age, discoveriture, \*coming of sound mind, enlargement out of prison, or returning from beyond seas, take benefit of and sue for the same, and at no time after the said three years.

And for the better and more perfect quieting of men's possessions and estates, and avoiding of suits,

SECT. 2. *Be it enacted*, that all and every person and persons whatsoever, now in possession of any lots, lands, tenements, or hereditaments whatsoever, within this Province, derived from any grant, allotment, or other power, or authority whatsoever, by, from, or under the late trustees for establishing this colony, or their president and assistants, or from any other person or persons whatsoever under their authority, or by or from any grant from his late majesty (of blessed memory), or from his present majesty, or by or under any last will and testament, purchase or purchases, whether by deed of gift, bill of sale, or other conveyance whatsoever, for lawful or valuable consideration, and where the person or persons now in the possession of the said lands, tenements, or hereditaments, do possess,

hold and claim the same, as of his, her, or their own proper right in fee-simple, and the person or persons so in possession, or the person or persons under whom they claim, have severally or successively been quietly possessed of the same under any of the titles, ways, or means aforesaid, and without lawful interruption by suit or action at law actually commenced, enjoyed the same for the space of twenty years before the passing of this Act, that then such person and persons so in possession as aforesaid shall have good right and title to the same, and shall have, hold, and enjoy the said lands, tenements, and hereditaments unto him, her, or them, his, her, or their heirs or assigns for ever in fee-simple, against all and every other person and persons whatsoever, any thing hereinbefore contained to the contrary notwithstanding.

SECT. 3. Not only the person or persons who are or shall be hereafter barred, by not suing or prosecuting his or their claims to any lands, tenements, or hereditaments in this Province within the time limited by this Act, but also all manner of persons whatsoever, that shall at any time claim under such person or persons, who have lost or may hereafter lose their right, by neglecting to sue and prosecute his or their claim as aforesaid, shall be in like manner barred by this Act, as his, her, or their ancestor or ancestors, or those under whom they claim, were or would have hereby been, and that this Act, and such clause or clauses herein as relate to the matters aforesaid, may be given in evidence to a jury upon a trial of any claim, matter, or right to any lands and tenements in question between party and party, and that the chief justice and judges upon all such trials shall allow the same to be given in evidence, so far as concerns the said matter in difference.

And to prevent any disputes how claims are to be made to lands, and what claims shall be allowed to be good and effectual in this Province, and that the possessors of lands may know how and in what manner other persons \*having or laying claim to any lands or tenements [\* ci] in their possession, must claim the same, and also that persons having right or title to lands or tenements possessed by others may the better know how to claim or demand their right in such case.

SECT. 4. *Be it enacted*, that all and every person and persons whatsoever, making claim to any lands or tenements in this Province, in order to make such claim effectual shall and are to make the same by action at law, duly entered in the general court of pleas in this Province, and that the chief justice and judges of the said court do allow of no claim to any lands or tenements, for or by any person or persons, in any suit or suits that may be brought, sued, or prosecuted in the said court, other than what is or has been made by action or suit on record as aforesaid, any law, custom, usage, or practice to the contrary notwithstanding.

SECT. 5. All actions of trespass *quare clausum fregit*, all actions of

trespass, detinue, actions of trover and replevin, for taking away goods and cattle, all actions upon account and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, all actions of debt for arrearages of rent), and all actions of assault, menace, and battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the passing of this Act, shall be commenced and sued within the time and limitation hereinafter expressed, and not afterwards, that is to say, the said actions upon the case (other than for slander), and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods and cattle, and the said actions of trespass *quare clausum fregit*, within three years next after the passing of this Act, or within four years next after the cause of such actions or suits, and not after; and the said actions of trespass, assault, battery, wounding, imprisonment, or any of them, within one year after the passing of this Act, or within two years next after the cause of such action or suit, and not after; and the said actions upon the case for words, within six months after the passing of this Act, or within six months next after the words spoken, and not after.

SECT. 6. If in any of the said actions or suits, judgment shall be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, or if any the said actions shall be brought by original, and the defendants therein be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after.

SECT. 7. In all actions of trespass *quare clausum fregit*, here-  
[\* cii] after to \* be brought, wherein the defendant or defendants shall disclaim in his or their plea, to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence, or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought, whereupon or upon some of them, the plaintiff or plaintiffs shall be enforced to join issue, and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said actions, and all other suit concerning the same.

SECT. 8. In all actions upon the case for slanderous words, to be sued or prosecuted by any person or persons, in the general court in this Prov-

ince, or in any other court having power to hold plea of the same, after the passing of this Act, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damage under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same, any law, statute, custom, or usage to the contrary in any wise notwithstanding.

SECT. 9. [Allowing further time to bring actions after the removal of plaintiff's disability, — transcribed into the Act of 1816, with a slight alteration. See Sect. 12.]

SECT. 10. In all and every case, where any penalty, fine, or forfeiture whatsoever hath been, or shall hereafter be inflicted or imposed by any Act or Acts of the General Assembly of this Province already passed or hereafter to be passed, and the time of suing or prosecuting the offender or offenders, against such Acts not thereby provided, no information, action, suit, or prosecution shall be had, brought, issued, or commenced against the offender or offenders, against any such Act or Acts, for or in respect of any such penalty, fine, or forfeiture, unless the same be done within six months after the passing of this Act, if the offence hath been already committed, and within the like space of time after the offence committed, for the future; and all and every offender and offenders against any such Act or Acts shall not from thenceforth be subject or liable to any penalty, fine, or forfeiture which may thereby be inflicted or imposed, any law, usage, or custom to the contrary in any wise notwithstanding.

*Limitation after the Removal of Disabilities.*

If any person or persons, that is or shall be entitled to any such action of trespass, detinue, action of trover, replevin, actions of account, actions of debt, action of trespass for assault, menace, battery, wounding, or imprisonment, actions on the case for words, be or shall be at the time of any such cause of action, given or accrued, fallen or come within the age of twenty-one \* years, *feme covert*, *non compos mentis*, imprisoned, or *where the defendant shall remove out of the jurisdictional limits of this State*, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as before is limited, after their coming to or being of full age, discover, of sane memory, at large, or the return of the defendant into the same, as by other persons having no such impediment should be done. *Provided, nevertheless*, that all notes, and instruments of writing, not under seal, bearing date after the passing of this Act, shall be of the same dignity with specialties, and subject to the same limitations heretofore in force in the case of specialties, any thing in the 5th. and 9th sections of the said Act to the contrary notwithstanding.

*Sealed Instruments, Notes, and Open Accounts.*

*Be it enacted, &c.*, that from and after the passing of this Act, all actions founded on bonds or instruments under seal shall be commenced and sued within twenty years after the said bond or other instrument shall become due, and not after ; and that all actions founded upon notes, and other acknowledgments under the hand of the party, shall be commenced within six years from the time such note or acknowledgment shall become due, and not after ; and that all actions founded upon open account shall be commenced within four years from the time such account accrued, and not after.

*Construction in favor of Idiots, Lunatics, and Infants.*

By the Act of 1817, the above statute, when it has commenced running, shall not so operate as to defeat the interest acquired by idiots, lunatics, or infants, after its commencement, "but the operation of the said statute shall cease until the disability or disabilities of such persons are removed, or from the arrival of such infant to twenty-one years."

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 ALABAMA.
*Actions Real and Personal and Right of Entry. (Digest of Laws of Alabama, 1843.)*

The limitation of the above actions in Alabama begins with the 78th section of the Act regulating Judicial Proceedings, as follows:—

SECT. 78. All actions of trespass *quare clausum fregit*; all actions of trespass, detinue, trover, and replevin for taking away of goods and chattels ; all actions of debt founded upon any lending, or contract, without specialty, or for arrearages of rent due on a parol demise, and all actions of account, and upon the case, except actions for slander, and except [\*civ] also \*such actions as concern the trade of merchandise, between merchant and merchant, their factors or agents, — shall be commenced within six years next after the cause of such action shall have accrued, and not after.

SECT. 79. All actions of trespass for assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within two years next after the cause of such action shall have accrued, and not after.

SECT. 80. Every action upon the case for words shall be commenced and sued within one year next after the words spoken, and not after: *Provided, always*, that if any person or persons, who is, are, or shall be, enti-



tled to any of the actions hereinafter specified, is, are, or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, *feme covert*, or insane, then such person or persons may institute such actions, so that the same be instituted within such time as is before limited, after his, her, or their coming to or being of full age, discover, or of sane memory.

SECT. 81. Every action of debt or covenant, for rent or arrearages of rent founded upon lease under seal; and every action of debt upon any single or penal bill for the payment of money only; or upon any obligation, with condition for the payment of money only; or upon any award, under the hands and seals of arbitrators, for the payment of money only, shall be commenced and sued within sixteen years after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, specialty, or award, within or after the said period of sixteen years, then an action instituted on such lease, specialty, or award, within sixteen years after such payment, shall be good and effectual in law, and not after: *Provided, always*, that the time during which the person who is or shall be entitled to any of the actions specified in this section shall have been within the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of sixteen years.

SECT. 82. Judgment in any court of record in this State may be revived by *scire facias*, or an action of debt may be brought thereon, within twenty years next after the date of such judgment, and not after: *Provided*, that the time during which the person who is or shall be entitled to the benefit of such judgment shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of twenty years.

SECT. 83. No person who now hath, or hereafter may have, any right or title of entry unto any lands, tenements, or hereditaments, shall make an entry therein, but within twenty years next after such right or title shall have accrued, and such person shall be barred from any entry afterward: *Provided, always*, that the time during which the person who hath or shall have such right or title of entry shall have been under the age of \* twenty-one years, *feme covert*, or insane, shall not be taken or [\* cv] computed as part of the same limited period of twenty years.

SECT. 84. If any person or persons against whom there is or shall be any cause of action, as is specified in the preceding sections of this Act, is, or are, or shall be out of this State at the time of the cause of such action accruing, or at any time during which a suit might be sustained on such cause of action, then the person or persons who is or shall be entitled to such action shall be at liberty to bring the same against such person or persons, after his, her, or their return into this State; and the time of such



person's absence shall not be accounted or taken as a part of the time limited by this Act.

SECT. 85. Every real, possessory, ancestral, mixed, or other action, for any lands, tenements, or hereditaments, shall be brought and instituted within thirty years next after the right or title thereto or cause of such accrued, and not after: *Provided, always*, that the time, during which the person who hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed part of the said limited period: *Provided, also*, that nothing in this Act contained shall be so construed as in any wise to affect or interfere with the primary disposal of the vacant lands of the United States within this State.

SECT. 86. If, in any of the said actions specified in any of the preceding sections of this Act, judgment be given for the plaintiff, and the same be reversed by writ of error; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, — then the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after.

SECT. 87. No person or persons, body politic or corporate, who now have, or shall or may hereafter have, any estate, right, title, claim, or demand, by virtue of any title which has not been confirmed by either of the Boards of Commissioners of the United States appointed for settling and adjusting land claims in the Mississippi Territory, and not recognized or confirmed by any Act of Congress, in or to any lands, tenements, or hereditaments in this State, shall, after the expiration of three years from and after the passage of this Act, have, prosecute, or maintain any action or suit at law for the recovery thereof, in any court in this State: *Provided*, that this Act shall not extend to claims in that part of this State formerly a part of West Florida, which have been registered and not acted on by Congress; *Provided, also*, that if any person or persons who is, are, or shall be entitled to sue or prosecute such suit or action, or who hath, have, or shall have such right or title, shall be within the age of twenty-one years, *feme covert*, or insane, within the time limited by this Act, then such person or persons, his, her, or their heirs or assigns, shall and may, at any [\* cvi] time within \* three years next after his, her, or their coming to full age, of sound mind, or discover, bring, sue, and prosecute such suit or action, and at no time thereafter.

SECT. 88. No action shall be brought to recover any money due by open account, after the expiration of three years from the accruing of the cause of action: *Provided*, that nothing in this Act shall apply to the trade of merchandise between merchant and merchant, their factors or agents.

SECT. 89. If any person or persons that is or shall be entitled to any of the personal actions enumerated and mentioned in this Act, and in the Act for the limitation of actions, and for avoiding vexatious lawsuits, be, or shall be, at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, or *non compos mentis*, — then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, or of sane memory, as other persons having no such impediment should have done.

SECT. 90. No action, suit, or motion shall be maintained against the security or securities of any sheriff, constable, or other public officer of this State, for any misfeasance, malfeasance, or other cause whatsoever, hereafter committed, unless the same be commenced or prosecuted within six years next after the commission of the act complained of; or, if the claim be in favor of an infant, or person *non compos mentis*, or other person disabled by law from bringing suit, then within three years after such disability to sue shall cease to exist: *Provided*, that this limitation shall not be extended or applied to any action, suit, or motion which may be maintained by law against such officer, his executors, administrators, or heirs: *And provided, further*, that nothing in this Act shall be so construed as to have a retrospective operation upon suits now pending.

SECT. 91. For any misfeasance, malfeasance, or other cause of action, heretofore committed by any sheriff, constable, or other officer, no suit, action, or motion shall be maintained against the security or securities of any such sheriff, constable, or other officer, unless the same be commenced and prosecuted within three years after the passage of this Act; subject always to the proviso in the first section of this Act.

SECT. 92. Where any lands have been sold, or may hereafter be sold, under the decree of the court of chancery, to satisfy any mortgage, deed of trust, or other incumbrance, all rights or equities of redemption in any person not a party to the decree of sale, who shall claim under the mortgagor or grantor in the deed of trust or incumbrance, shall be for ever barred and precluded, unless the suit for a redemption be commenced within five years from the execution of such decree of sale: *Provided*, that no suit shall be barred by the operation of this Act within five years from its passage.

\* SECT. 93. All actions for recovery of lands, tenements, or [\* cvii] hereditaments in this State shall be brought within ten years after the accrual of the cause of action, and not after: *Provided*, that five years be allowed under both sections of this Act for infants, *femes covert*, insane persons, and lunatics, after the termination of their disabilities, to bring suits.

## MISSISSIPPI.

*Real and Mixed Actions. (Statutes of Mississippi, How. & Hutch. Ch. 43.)*

SECTION 88. From and after the passing of this Act, every real, possessory, ancestral, mixed, or other action, for any lands, tenements, or hereditaments, shall be brought and instituted within twenty years next after the right or title thereto, or cause of such action accrued, and not after: *Provided*, that the time during which the person who hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period: *Provided, also*, that nothing in this Act shall be so construed as in any wise to affect or interfere with the primary disposal of the lands of the United States within this State.

SECT. 89. No person who now hath, or hereafter may have, any right or title of entry into any lands, tenements, or hereditaments, shall make any entry therein, but within twenty years next after such right or title shall have accrued, and such person shall be barred from any entry afterwards: *Provided, always*, that the time during which the person who hath or shall have such right or title of entry shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of twenty years.

SECT. 90. Fifty years' actual possession of any lands, tenements, or other real estate, uninterruptedly continued by occupancy, descent, conveyance, or otherwise, in whatever way or manner such possession might have commenced or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements, or other real estate, and shall be a good and sufficient bar to all claims that may be made or actions commenced, by any person or persons whatever, for the recovery of any such lands, tenements, or other real estate.

SECT. 91. All actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin, for taking away goods and [\* cviii] chattels, \* all actions of debt founded upon any lending or contract, without specialty, or for arrearages of rent due on a parol demise, and all actions of account and upon the case, except actions for slander, and except also such actions as concern the trade or merchandise between merchant and merchant, their factors, agents, and servants, shall be commenced and sued within six years next after the cause of such actions shall have accrued, and not after. (See 106, 108, 109, 110, 111).

SECT. 92. All actions of trespass, for assault, menace, battery, wounding, and imprisonment, or any of them, shall be commenced and sued within two years next after the cause of such action shall have accrued, and not after.

SECT. 93. Every action upon the case for words shall be commenced and sued within one year next after the words spoken, and not after.

SECT. 94. If any person or persons who is, or are, or shall be entitled to any of the actions specified in the three preceding sections of this Act, is, are, or shall be, at the time of any such cause of action accruing, within the age of twenty-one years, *feme covert*, or insane, then such person or persons shall be at liberty to bring such action, so as he, she, or they institute or take the same within such time as is before limited, after his, her, or their coming to or being of full age, discover, or of sane memory, as by other person or persons having no such impediment might be done.

SECT. 95. Every action of debt, or covenant for rent or arrearages of rent, founded upon any lease under seal, and every action of debt upon any single or penal bill for the payment of money only, or upon any obligation with condition for the payment of money only, or upon any award, under the hands and seals of arbitrators, for the payment of money only, shall be commenced and sued within sixteen years next after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, specialty, or award within or after the said period of sixteen years, then an action instituted on such lease, specialty, or award within sixteen years after such payment shall be good and effectual in law, and not after: *Provided, always*, that the time during which the person who is or shall be entitled to any of the actions specified in this section shall have been within the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of sixteen years.

SECT. 96. Judgments in any court of record in this State may be revived by *scire facias*, or an action of debt may be brought thereon, within twenty years next after the date of such judgment, and not after: *Provided*, that the time during which the person who is or shall be entitled to the benefit of such judgment shall have been under the age of twenty-one years, *feme covert*, or insane, shall not be taken or computed as part of the said limited period of twenty years.

SECT. 97. And whereas it is reasonable that persons entering into \*bonds or recognizances, as sureties for any public [\* cix] officers, should be exonerated from their responsibility within a reasonable term after such officers respectively shall die, resign, or be removed from office; therefore, *Be it further enacted*, that it shall not be lawful for any person or persons, whomsoever, to commence and maintain any suit or suits on any bonds or recognizances which shall hereafter be given and entered into by any person or persons, as sureties for any public officer, from and after the expiration of the term of five years, to be computed from the time at which the cause of action shall have accrued; and if any such suit or suits shall be commenced contrary to the intent and meaning of this Act, the defendant or defendants, respectively, shall and

may plead the general issue, and give this Act and the special matter in evidence; and if the plaintiff or plaintiffs be nonsuit, or if a verdict or judgment pass against him or them, respectively, the defendant or defendants shall respectively recover double costs.

SECT. 98. All suits or actions founded upon any account for goods, wares, or merchandise sold and delivered, or for any articles charged in any store account, shall be commenced and sued within two years next after the cause of such suit or action, or the delivery of such goods, wares, and merchandise, and not after; except, that in the case of the death of the creditors or debtors before the expiration of the said term of two years, the further time of one year from the death of such creditor or debtor shall be allowed for the commencement of any such suit or action. And, to prevent imposition or deception herein, the respective times or dates of the delivery of the several articles charged in any such account, or any receipt taken for the delivery of them, shall be particularly specified. And if any merchant or trader shall wilfully post-date any article or articles in such account, or the receipt taken for the delivery of them, he shall forfeit and pay tenfold the amount of the article or articles so post-dated, to be recovered, with costs, by warrant where the penalty does not exceed the jurisdiction of a justice of the peace, and by action of debt or information in any court of record where the penalty shall exceed the jurisdiction of a justice of the peace, to the informer, where the informer prosecutes, or to the State for the use of the literary fund, where the prosecution shall be first instituted on the public behalf. And to prevent any doubt in the construction hereof, it is hereby declared, that the before-mentioned limitation of two years shall take place and be computed from the respective dates or times of delivery of the several articles entered or charged in any such account; and that all such articles as shall have been of more than two years' standing when the suit or action was commenced, shall be disallowed and rejected, and verdict shall be given or judgment rendered for no more than the amount of such articles as appear to have been actually charged or delivered within two years next before the commencement of the suit or action aforesaid, except as above excepted.

SECT. 99. If any person or persons against whom there is or shall [\* cx] be \* any cause of action, as is specified in the preceding sections of this Act (except for the recovery of lands, tenements, or hereditaments), is or are or shall be out of this State at the time of the cause of such action accruing, or any time during which a suit might be sustained on such cause of action, then the person or persons who is or shall be entitled to such action shall be at liberty to bring the same against such person or persons after his, her, or their return into this State; and the time of such person's absence shall not be accounted or taken as a part of the time limited by this Act.

SECT. 100. No action of debt shall be brought against any executor or administrator, or other person having charge of the estate of a testator or intestate, upon a judgment obtained against his testator or intestate, nor shall any *scire facias* be issued against any executor or administrator, or other person having charge of the estate as aforesaid, to revive such judgment after the expiration of six years from the qualification of such executor or administrator, or of such other person having charge of the estate; and all such judgments, after the expiration of six years, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged; saving to all persons *non compos mentis*, *femes covert*, or infants, who may have been entitled to the benefit of such judgment, three years after their several disabilities are removed.

SECT. 101. If, in any of the said actions specified in any of the preceding sections of this Act, judgment be given for the plaintiff, and the same be reversed by writ of error; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, then the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after.

SECT. 102. No bill of review shall be granted by the Supreme Court, or any judge thereof, or by the Superior Court of Chancery, to any decree pronounced in a cause which shall be finally decided, unless the same be applied for within two years next after such final decision, saving to infants, *femes covert*, and persons of insane mind, a right to obtain such bill of review within two years after their respective disabilities are removed.

SECT. 103. No writ of error or *supersedeas* shall be granted to any judgment of a court of law, after the expiration of two years from the time when such judgment shall have been made final; saving to all persons *non compos mentis*, infants, and *femes covert*, two years after their several disabilities are removed.

SECT. 104. In all actions of assault and battery, and slander, commenced and prosecuted in any court of law in this State, if the jury find for the plaintiff under the sum of ten dollars, he shall not recover any costs. And in all actions of trespass *quare clausum fregit*, where the court before \* whom the trial shall be shall not be satisfied, and enter upon the [\* cxi] minutes that the freehold, title, or interest of the land mentioned in the plaintiff's declaration was or might have been in good question, or that the trespass was wilful or malicious; and in all other actions of trespass, where the court before whom the trial shall be shall not be satisfied, and enter upon the minutes that the trespass was wilful or malicious; and in all actions upon the case, actions of covenant, and actions of debt for a



penalty intended to secure the performance of a covenant or condition, where the court before whom the trial shall be shall not be satisfied, and enter upon the minutes that the action was neither frivolous nor vexatious, — if the jury find under ten dollars, the plaintiff shall not recover more costs than the sum so found; and, if more costs are awarded, the judgment shall be void, and shall be amended upon a motion at any time by the court who awarded the same; and the party injured shall be redressed as to such costs so wrongfully awarded, in case the same be levied upon him. And where several persons shall be made defendants in any action of trespass, assault, false imprisonment, or ejectment, and upon the trial thereof any one or more of them shall be acquitted by verdict, every defendant so acquitted shall have and recover his costs of suit, in like manner as if a verdict had been given against the plaintiff or plaintiffs, and acquitted all the defendants; unless the court before whom such cause shall be tried shall be satisfied that there was reasonable cause for making such person or persons defendant or defendants to such action, and shall order it otherwise.

SECT. 105. In all actions of trespass *quare clausum fregit*, wherein the defendant or defendants shall disclaim, in his or their plea, to make any title or claim to the land in which the trespass is by the declaration supposed to be done, and the trespass be by negligence or involuntary, the defendant or defendants shall be admitted to plead a disclaimer, and that the trespass was by negligence or involuntary, and a tender or offer of sufficient amends for such trespass before the action brought; whereupon, or upon some of them, the plaintiff or plaintiffs shall join issue; and if the said issue be found for the defendant or defendants, or the plaintiff or plaintiffs shall be nonsuited, the plaintiff or plaintiffs shall be clearly barred from the said action or actions, and all other suits concerning the same.

SECT. 106. The limitation of six years mentioned in the fourth section of the Act entitled “An Act for the limitation of actions and certain proceedings in civil cases, and for preventing frivolous and vexatious suits,” passed June the seventh, one thousand eight hundred and twenty-one, be and the same is hereby repealed; and that, in lieu thereof, all actions enumerated in the said fourth section, except actions on promissory notes, shall be prosecuted in three years next after the cause of such action shall have accrued, and not after.

SECT. 107. The limitations of two years mentioned in the eleventh section of the Act mentioned in the second section of this Act, is [\* cxii] hereby \* repealed; and that, in lieu thereof, all actions founded upon any account for goods, wares, and merchandise sold and delivered, or for any article charged in any store account, shall be commenced and prosecuted in three years, and not after.

SECT. 108. The second section of the Act to which this is an amendment, be and the same is hereby repealed; and the fourth section of the



Act entitled "An Act for the limitation of actions, and certain proceedings in civil cases, and for preventing frivolous and vexatious suits," passed June seventh, eighteen hundred and twenty-two, be and the same is hereby revived.

*An Act explanatory of certain Statutes of Limitations.*

SECT. 109. Whereas doubts have arisen as to the true intent and meaning of the second section of the eighty-fifth chapter of the Acts passed in the year eighteen hundred and twenty-seven, and also of the second section of the eighty-ninth chapter of the Acts passed in the year eighteen hundred and twenty-eight, the provisions of the said Act of eighteen hundred and twenty-seven having been erroneously construed as operating a repeal of the statute of limitations of eighteen hundred and twenty-two, in the several actions enumerated in the fourth section of the twenty-first chapter of the Revised Code: And whereas the period of time barring the said several actions enumerated in the said fourth section of the twenty-first chapter of said code, was alone intended to be altered by the said Act of eighteen hundred and twenty-seven; namely, from six to three years, excepting actions on promissory notes, as to which the provisions of the said Act of eighteen hundred and twenty-two remained unchanged: And whereas the said Act of eighteen hundred and twenty-seven was repealed, and the original provisions of the said fourth section of the twenty-first chapter of the said code, revised by the said Act of eighteen hundred and twenty-eight: — Therefore,

SECT. 110. *Be it enacted by the Senate and House of Representatives of the State of Mississippi, in General Assembly convened,* That the said Act of eighteen hundred and twenty-seven shall be so construed as not to repeal the Act of limitations of eighteen hundred and twenty-two, in the several actions embraced in the fourth section of the twenty-first chapter of the Revised Code, but only as an alteration of the time required to bar said actions; and that the said Act of eighteen hundred and twenty-seven shall not be so construed as to revive any cause of action which was barred under the said fourth section of the twenty-first chapter of the said Code, at the time of the passage of the said Act of eighteen hundred and twenty-seven.

The said Act of eighteen hundred and twenty-eight, repealing the said second section of the Act of eighteen hundred and twenty-seven, and reviving the said fourth section of the twenty-first chapter of the Revised Code, shall not be so construed as to revive any cause of action barred or intended to be barred under either of the said Acts of eighteen hundred and \*twenty-two, or eighteen hundred and twenty-seven, at the [\* cxiii] time of the passage of the said Act of eighteen hundred and twenty-eight.

SECT. 111. All claims which, under and by virtue of the fourth section of the Act entitled "An Act for the limitation of actions and certain proceedings in civil cases, and for preventing frivolous and vexatious suits," passed June seventh, eighteen hundred and twenty-two, were barred of recovery prior to the passage of an Act entitled "An Act to amend the forty-fifth section of the Act entitled an Act to reduce into one the several Acts concerning the establishment, jurisdiction, and powers of the superior courts of law, and for other purposes," passed June twenty-eight, eighteen hundred and twenty-two, and which have been revived by the second section of the last recited Act, passed eighteen hundred and twenty-seven, are hereby for ever barred, unless suit be instituted for the recovery thereof within twenty days after the passage of this Act.

The ninth section of the said Act of eighteen hundred and twenty-two shall be extended so as to include judgments recovered in any court of record, as well without as within this State.

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LOUISIANA.

*Possession and Personal Actions. (Abstract from Civil Code of Louisiana, from 4 Griffith's Annual Law Register, p. 686.)*

*Thirty years' possession prescribes land, though possessed without any title, or knavishly.*

If possessed fairly and honestly and by *just title*, that is, one by virtue of which property may be transferred, such a *sale* or *donation*, though no real right may be thereby given, *ten years' possession* will be sufficient if the true proprietor resides in the State, and *twenty years* in case he resides abroad.

Besides the thirty, twenty, and ten years' prescription with respect to lands, there is another of *four years*, which runs against the minor after coming of age, as to any real estate alienated by the tutor in cases not provided by law.

For the prescription arising from the ten or twenty years' possession, there must be good faith and apparently good title; if, therefore, the title be defective with respect to *form*, there can be no basis for the ten or twenty years' prescription.

Also, any interruption, either natural or legal, suspends prescription.

A natural interruption is said to take place when the possessor [\* cxiv] is deprived \* of possession of the thing for more than a year, either by the ancient proprietor or by a third person.

A legal interruption takes place when the possessor has been cited to

appear before a court of justice, on account of either the property or the possession.

It ceases likewise to run when the debtor or possessor makes acknowledgment of the right of the person whose title they prescribed.

Husbands and wives cannot prescribe against one another.

Minors and persons under interdiction cannot be prescribed against.

Married women may be prescribed against, though not separated of property, for all belonging to them and administered by their husbands, saving their recourse against their husbands.

But prescription does not take place during marriage, as it respects property alienated which made a part of the dowry, nor in any case during marriage when the action of the wife may be prejudicial to her husband.

Finally, lands not acquirable by alienation cannot be obtained by prescription.

The only saving in favor of foreigners or citizens of other States is the requiring twenty years instead of ten, as heretofore mentioned.

To this is to be added, that, if the true proprietor of the land resided at times in the State and at times out of it, *two years'* absence must be computed as one year of actual residence, and thus added to the time of residence already elapsed.

Any Act which amounted to an express or tacit renunciation would bar limitation. As yet, there are no decisions worthy of note upon this subject.

When the civil code is silent, this State is obliged to have recourse to the Spanish law concerning limitations, as laid down in the *Partidas* and in *Febrero*.

Prescription may be pleaded in any stage of a cause, even on an appeal.

Creditors, and every other person who may have any interest in acquiring an estate by prescription, have a right to plead it, even in case the person claiming such an estate should renounce the said right of prescription.

All *personal* actions may be prescribed against after *thirty years*; nor can it be alleged that the party pleading it acted knavishly.

After the expiration of *ten years*, the architect or undertaker is released from all responsibility with respect to stone or brick buildings, and *five years* will release him with respect to wooden buildings or frames filled up with brick.

Slaves may be prescribed for in *half* the time required for the prescription of immovable estates, and in the same manner and subject to the same exceptions.

If a man has a public and notorious possession of a thing for *three years* in presence of the owner, he being a resident within the State, he is presumed \* to have known it, and the property is vested in the [\* cxv] possessor, unless stolen.

And if the thing were stolen, yet if purchased by the possessor at a public market or fair, or at auction, or from a person dealing in similar commodities, the owner can only reobtain possession by paying the purchase-money.

Claims of teachers or schoolmasters for lessons given by the month are prescribed against after a *year*, unless a settlement has taken place, a note given, or an action be pending before a court of justice.

So likewise with keepers of taverns and boarding-houses, for boarding and lodging.

So also with workmen and day-laborers for payment of their day's works, and of the materials by them furnished.

So also for domestics who let their services by the year.

The arrears on life annuities, alimony, rent of houses and rural estates, the interest of money lent, and every thing generally which is to be paid by the year or at shorter periods, may be prescribed against at the expiration of *five years*.

The prescription as regards all these persons (beginning with schoolmasters) runs against minors and interdicted persons, reserving to them all such remedies as they may have against their tutors and curators.

The only savings are the tacit or express renunciation.

There are no savings exclusively in favor of citizens of other States or foreigners.

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## WESTERN STATES.

### TENNESSEE.

*Real Property*, 1819, *Ch.* 28. (*Compilation of the Statutes of Tennessee*, 1826.)

Whereas many disputes have arisen with regard to the proper construction of the statutes of limitation, and the time seems fast approaching when the titles to land will become so perplexed that no man will know from whom to take or buy lands, for remedy whereof.

SECTION 1. In all cases where any person or persons, their heirs or assigns, shall, at the passing of this Act, or at any time after having had seven years' possession of any lands, tenements, or hereditaments, which have been granted by this State, or the State of North Carolina, [\* cxvi] holding or \* claiming the same by virtue of a deed or deeds of conveyance, devise, grant, or other assurance, purporting to convey an estate in fee-simple, and no claim by suit in law or equity, effect-

ually prosecuted, shall have been set up or made to the said lands, tenements, and hereditaments within the aforesaid time, then and in that case the person or persons, their heirs or assigns so holding possession as aforesaid, shall be entitled to keep and hold in possession such quantity of land as shall be specified and described in his, her, or their deed of conveyance, devise, grant, or other assurance as aforesaid, in preference to and against all and all manner of person or persons whatsoever; and any person or persons, and their heirs, who shall neglect, or who shall have neglected for the said term of seven years, to avail themselves of the benefit of any title, legal or equitable, which he, she, or they may have to any lands, tenements, or hereditaments, within this State, by suit of law or equity, effectually prosecuted against the person or persons so as aforesaid in possession, shall be for ever *barred*, and the person or persons, their heirs or assigns, so holding or keeping possession as aforesaid, for the term aforesaid, shall have a good and indefeasible title in fee-simple to such lands, tenements, or hereditaments: *Provided*, that if any person or persons that have been, are, or shall be entitled to commence and prosecute such suit in law or equity, shall have been, be, or shall be, at the time of said right or title first descended, accrued, come, or fallen within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the limits of the United States and the Territories thereof, that then such person and persons, his, her, or their heir or heirs, shall or may, notwithstanding the seven years be expired, bring his or her suit or action, as he, she, or they might have done before this Act, so as such person and persons, or his, her, or their heir and heirs, shall, within three years next after his, her, and their full age, discoveriture, coming of sound mind, enlargement out of prison, coming into the United States or the Territories thereof, or death, take benefit of and commence such suit, and at no time after the said three years. *Provided, also*, that, in the construction of this saving, no cumulative disability shall prevent the bar aforesaid, but shall only apply to that or those disabilities which existed when the right to sue first accrued, and no other: and *Provided, also*, that such suit so commenced to save the bar shall be a suit prosecuted with effect, and no other.

SECT. 2. No person or persons, or their heirs, shall have, sue, or maintain any action or suit, either in law or equity, for any lands, tenements, or hereditaments, but within seven years next after his, her, or their right to commence, have, or maintain such suit shall have come, fallen, or accrued; and that all suits, either in law or equity, for the recovery of any lands, tenements, or hereditaments, shall be had and sued within seven years next after the title or cause of action, or suits accrued or fallen, and at no time after the said seven years shall have passed: *Provided*, that if any person \* or persons that is or shall be entitled to commence [\* cxvii] and prosecute such suit or action in law or equity be, or shall be,

at the time of said right or title first accrued, come, or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the limits of the United States and the Territories thereof, that then such person or persons, his, her, and their heir or heirs, shall and may, notwithstanding the said seven years be expired, bring his or her suit or action as he, she, or they might have done before this Act, so as such person and persons, his, her, and their heir and heirs, shall, within three years next after his, her, and their full age, discoveriture, coming of sound mind, enlargement out of prison, coming into the United States or the Territories thereof, or death, take benefit of and commence such suit, and at no time after the said three years: *Provided, also*, that in the construction of this saving, no cumulative disability shall prevent this bar, but shall only apply to that or those disabilities which existed at the time when the right to sue first accrued, and no other: and *Provided, also*, that such suit, so commenced to prevent the bar, shall be a suit prosecuted with effect, and no other.

SECT. 3. *Provided, nevertheless*, that if, on any of the said actions or suits, judgment shall be given for the plaintiff, and the same be reversed by writ of error, or verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, bill, or suit; or if any of said actions shall be commenced by original writ, and the defendant cannot be legally attached or served with process, in all such cases, the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or until the defendant can be attached or served with process, so as to compel him, her, or them to appear and answer: and *Provided, also*, that this Act shall have no bearing on the lands reserved for the use of schools.

SECT. 4. All laws and parts of laws, within the purview and meaning of this Act, shall stand repealed from and after the passing of this Act.

#### *Personal Actions.*

Ch. 27 enacts: SECT. 5. That all actions of trespass, detinue, actions *sur trover*, and replevin for taking away goods and chattels, all actions of accounts and upon the case, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time after the ratification of this Act, shall be commenced or brought within the time and limitation in this Act expressed, and not after: that is to say, actions of account, render, actions upon the case, actions of debt for arrearages of rent, actions of detinue, replevin, and trespass *quare clausum fregit*, within [\* cxviii] three years \*next after the ratification of this Act, or within

three years next after the cause of such action or suit, and not after, except such accounts as concern the trade of merchandise between merchant and merchant, and their factors or servants; and the said actions of trespass, assault and battery, wounding, imprisonment, or any of them, within one year next after the ratification of this Act, or within one year after the cause of such action or suit, and not after, and the said actions upon the case for words, within six months after the ratification of this Act, or within six months after the words spoken, and not after.

SECT. 6. That if, on any of the said actions or suits, judgments be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill; or if any of the said actions shall be brought by original writ, and the defendant cannot be attached, or legally served with process, that in all such cases the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or till the defendant can be attached or served with process, so as to compel him to appear and answer.

SECT. 9. If any person or persons that is or shall be entitled to any such action of trespass, detinue, actions *sur trover*, replevin, actions of accounts, and upon the case, actions of debt for arrearages of rent, actions of assault, menace, battery, wounding, and imprisonment, actions of trespass *quare clausum fregit*, actions upon the case for slanderous words, be, or shall be, at the time of any such cause of action given or accrued, fallen or come within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond seas, that then such person or persons shall be at liberty to bring the same actions, so as they bring the same within such times as are before limited, after their coming to or being of full age, discover, of sound memory, at large, or returned from beyond seas, as other persons having no such impediments might have done.

#### *Beyond Seas.*

By Act of 1827, the words "beyond seas" shall be deemed and taken to mean beyond the limits of the United States, in all statutes of limitation then in force.

#### *Book Accounts.*

Actions upon, limited to five years after delivery of the goods.



[\*CXIX]

\* KENTUCKY.

*Real Property. (Digest of Laws of Kentucky, 1834.)*

SECTION 1. *Be it enacted by the General Assembly*, that any person may maintain a writ or right upon the possession or seisin of his ancestors or predecessors, within fifty years, or any other possessory action upon the possession or seisin of his or her ancestor or predecessor within forty years next before the teste of the writ; but no person shall maintain a real action upon his own possession or seisin, but within thirty years next before the teste of the writ.

SECT. 2. All writs of *formedon in descender*, remainder, or reversion of any lands, tenements, or hereditaments whatsoever, hereafter to be brought upon any title heretofore accrued, or which may hereafter fall or accrue, shall be sued out within twenty years next after such title or cause of action accrued, and not afterwards; and that no person or persons who now hath, or have, or may hereafter have any right or title of entry into any lands, tenements, or hereditaments, shall make any entry, but within twenty years next after such right or title accrued, and such person shall be barred from any entry afterwards.

SECT. 3. *Provided, nevertheless*, that if any person or persons entitled to such writ or writs, or to such right or title of entry as aforesaid, shall be or were under the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or not within this commonwealth at the time such right or title accrued or coming to them; every such person, and his or her heirs, shall and may, notwithstanding the said twenty years are or shall be expired, bring and maintain his action or make his entries [within ten years next after such disabilities removed, or death of the person so disabled, and not afterwards].

*Personal Actions.*

SECT. 4. All actions of trespass *quare clausum fregit*; all actions of trespass, detinue, actions *sur trover*, and replevin, for taking away of goods and chattels; all actions of account, and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought at any time hereafter, — shall be commenced and sued within the time and limitation hereafter expressed, and not after: that is to say, the said actions upon the case other than for slander; and the said actions for account; and the said actions for trespass, debt, detinue, and replevin for goods and chattels; and the [\*CXX] said actions of \*trespass *quare clausum fregit*, within five years

next after the cause of such action or suit, and not after; and the said action of trespass, assault and battery, wounding and imprisonment, or any of them, within three years next after the cause of such action or suits, and not after; and the said action upon the case for words, within one year next after the words spoken, and not after.

SECT. 5. All suits or actions founded upon account for goods, wares, and merchandise sold and delivered, or for any article charged in any store account, shall be commenced and sued within twelve months next after the cause of such action or suit, or the delivery of such goods, wares, and merchandise, and not after, except that, in case of the death of the creditors or debtors before the expiration of the said term of twelve months, the further time of twelve months from the death of such creditor or debtor shall be allowed for the commencement of any such action or suit. And, to prevent imposition or deception herein, the respective time of date of the delivery of the several articles charged in any such account, or of any receipt taken for the delivery of them, shall be particularly specified; and if any merchant or trader shall wilfully postdate any article or articles in such account, or the receipt taken for the delivery of them, he shall forfeit and pay tenfold the amount of the article or articles, or of the receipt taken for the delivery of them so postdated, to be recovered with costs before any justice of the peace, where the penalty incurred shall be under five pounds, or amount to that sum only. And by action of debt or information, where the penalty shall be more than five pounds, to the informer where the informer prosecutes, or to the commonwealth where the prosecution shall be first instituted on the public's behalf: and, to prevent any doubts in the construction hereof, *It is hereby declared*, that the before-mentioned limitation of twelve months shall take place and be computed from the respective dates or times of the delivery of the several articles entered or charged in any such account; and that all such articles as shall have been more than twelve months standing when the action or suit was commenced shall be disallowed and rejected, and verdict shall be given or judgment rendered for no more than the amount of such articles as appear to have been actually charged or delivered within twelve months next before the commencement of the suit as aforesaid.

SECT. 6. *Provided, nevertheless*, that if, in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed afterwards by error, or a verdict passed for the plaintiff, and, upon matter lodged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, — that, in all such cases, the party plaintiff, his heirs, executors, or administrators, as the case shall require, may commence a new action or suit from time to time within one year after such judgment reversed or such judgment given against the plaintiff, and not after.

SECT. 7. *Provided, always*, that in all questions which may arise in

[\* cxxi] \* any court of record, upon any Act for limitation of actions, making entries into lands, or limitation of evidence in the computation of time, the several periods between the twelfth day of April, one thousand seven hundred and seventy-four, and between the twelfth day of April, one thousand seven hundred and seventy-eight; and between the first day of January, one thousand seven hundred and eighty-one, and the first day of January, one thousand seven hundred and eighty-two; and between the fifth day of May, one thousand seven hundred and eighty-three, and the twentieth of October in the same year, shall not be accounted any part thereof, so as to bar such action, entry, or evidence.

SECT. 8. *Provided*, that if any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, be, or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, beyond the seas, or out of the country, — that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, *discover*, of sane memory, at large, and returned from beyond the seas, or from without this country, as by other persons having no such impediment should be done.

SECT. 9. *Provided, also*, that if any person or persons, defendant or defendants to any of the aforesaid actions, shall abscond or conceal themselves, or by removal out of the country or the county where he or they do or shall reside, when such cause of action accrued, or by any other indirect ways or means, defeat or obstruct any person or persons who have title thereto, from bringing and maintaining all or any of the aforesaid actions within the respective times limited by this Act, — that then, and in such case, such defendant or defendants are not to be admitted to plead this Act in bar to any of the aforesaid actions; any thing in this law in any wise to the contrary notwithstanding.

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OHIO.

*Actions Real and Personal. (Statutes of Ohio, 1841.)*

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, that all actions hereinafter mentioned shall be commenced within the several times hereinafter limited, after the cause of such action shall have accrued, and not after:

[\* cxxii] \* *First*. Actions of ejectment, or any other action for the recovery of the title, or possession of lands, tenements, or hereditaments, within twenty-one years.

*Second.* Actions for forcible entry and detainer, or forcible detainer only, within two years.

*Third.* Actions upon the case, covenant, and debt, founded upon a speciality, or any agreement, contract, or promise in writing, within fifteen years.

*Fourth.* Actions upon the case and debt, founded upon any simple contract not in writing, and actions on the case for consequential damages, within six years.

*Fifth.* Actions of trespass upon property, real or personal, detinue, trover, and replevin, within four years.

*Sixth.* Actions of trespass for any injury done to the person; actions of slander for words spoken, or for a libel; actions for malicious prosecutions, and for false imprisonments; actions against officers for malfeasance or nonfeasance in office, and actions of debt *qui tam*,—within one year.

All other actions not herein enumerated, within four years after such right of action shall have accrued; and that, when any action for a forfeiture or penalty shall be given, and limited by statute, such action shall be commenced within the time so limited.

SECT. 2. That if any person entitled to have or maintain any action of ejectment for the recovery of the title or possession of any lands, tenements, or hereditaments, be, at the time his right or title first descended or accrued, within the age of twenty-one years, *feme covert*, insane, or imprisoned, every such person may, after the expiration of twenty-one years from the time his right or title first descended or accrued, bring such action within ten years after such disability removed, and at no time thereafter. And if any person entitled to any other action, limited by this Act, shall, at the time such cause of action accrued, be within the age of twenty-one years, *feme covert*, insane, or imprisoned, every such person shall be at liberty to bring such action, within the respective times limited by this Act, after such disability shall be removed.

SECT. 3. That in all cases where the person entitled to have or maintain any action of ejectment as aforesaid shall have been subject to the disabilities aforesaid, but which shall have been removed at any time not exceeding eleven years prior to the first of June, eighteen hundred and thirty, every such person may bring such action within ten years thereafter; but, if such disability shall have ceased or been removed more than eleven, and not exceeding twenty-one, years prior to said first of June, eighteen hundred and thirty, then such person so disabled as aforesaid shall have the liberty of bringing such action within such times after the said first of June, eighteen hundred and thirty, as, being added to the excess of time over eleven years as aforesaid, will be equal to ten years, and no more.

[\* cxxiii] \* SECT. 4. That in all actions founded on contract, either express or implied, made between persons resident without this State at the time such contract was made, and which are, or hereafter may be, barred by the laws of the State, country, or territory where such contract was made, shall be and continue barred when brought in any court of this State.

SECT. 5. That in all actions founded on contract, either express or implied, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made within the time herein limited, such action may be commenced within the time hereinbefore limited, after such payment, acknowledgment, or promise.

SECT. 6. That if, in any action commenced within the time limited by this Act, judgment shall be arrested or reversed, or the suit abate, or the plaintiff become nonsuited, and the time limited as aforesaid shall have expired, the plaintiff may commence a new action within one year after such arrest or reversal of judgment, nonsuit, or abatement of action, as aforesaid, and not after.

SECT. 7. That when any person shall have left the State, and remained out of the same, or shall reside out of the State, at the time any cause of action shall have accrued against him; or shall have removed to any place unknown to the person in whose favor such cause of action may exist during such time as is limited by this Act, the person who may have such cause of action shall have a right to commence his or her action against such person, within such time as is limited as aforesaid, after his or her return or removal to the State; or, if within the State, then within such time after his or her place of residence shall become known.

#### *Estates of Testators and Intestates.*

Ch. 47, Sect. 90, enacts: If a claim against the estate of any deceased person be exhibited to the executor or administrator, before the estate is represented insolvent, and be disputed or rejected by him, and the same shall not have been referred, the claimant shall, within six months after such dispute or rejection, if the debt, or any part thereof, be then due, or within six months after some part thereof shall have become due, commence a suit for the recovery thereof, or be for ever barred from maintaining any action thereon; and no action shall be maintained thereon after the said period, by any other person deriving title thereto from such claimant; and any executor or administrator may, on the trial of any action founded upon such demand, give in evidence, in bar thereof, under a notice annexed to the general issue, the facts of such refusal and neglect to commence a suit. A claim shall be deemed disputed or rejected, if the executor or administrator shall, on presentation of the vouchers thereof, refuse,

on demand made for that purpose, to indorse thereon his allowance of the same, as a valid claim against the estate.

*\* Land sold by Executor or Administrator. [\* cxxiv]*

Ch. 47, Sect. 160, enacts: No action for the recovery of any estate sold by an executor or administrator, under the provisions of this Act, shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within five years next after the sale; excepting only that persons out of the State, and minors and others under any legal disability to sue at the time when the right of action shall first accrue, may commence such action within five years after the removal of the disability, or after their return to the State.

*Suits against Executors and Administrators.*

Ch. 4, Sect. 103, 104, and 105, enact as follows:—

SECT. 103. No executor or administrator, after having given notice of his appointment, as provided in the eighty-first section of this Act, shall be held to answer to the suit of any creditor of the deceased, unless it be commenced within four years from the time of his giving bond as aforesaid, excepting in the cases hereinafter mentioned.

SECT. 104. When assets shall come to the hands of an executor or administrator, after the expiration of the said four years, he shall account for and apply the same in like manner as if they had been received within the four years; and he shall be liable to an action, and to be proceeded against on account of such assets, by or for the benefit of any creditor, in like manner as if the assets had been received within the said four years: *Provided*, that such action or proceeding be commenced within one year after the creditor shall have notice of the receipt of such new assets, and not more than four years after the same shall be actually received.

SECT. 105. Any creditor of the deceased whose right of action shall not accrue within the said four years after the date of the administration bond, may present his claim to the court from which the letters issued, at any time before the estate is fully administered; and if, on examination thereof, it shall appear to the court that the same is justly due from the estate, they may, by the consent of the creditor and executor, or administrator, order the same to be discharged, in like manner as if due, after discounting interest, as mentioned in the ninety-fourth section of this Act; or the court may order the executor or administrator to retain in his hands sufficient to satisfy the same; or, if any of the heirs of the deceased, or devisees, or others interested in the estate, shall offer to give bond to the alleged creditor, with sufficient surety or sureties, for the payment of the demand, in case the same shall be proved to be due from the estate, the court may, if they think fit, order such bond to be taken, instead of ordering the claim to be dis-

charged as aforesaid, or requiring the executor or administrator to retain assets as aforesaid.

SECT. 229 of the same chapter enacts: If it shall not be ascertained, \* at the end of three years after the granting of letters testamentary or of administration, whether any estate that has been represented insolvent is or is not so in fact, any creditor whose claim shall not have been presented before the commissioners, or to the executor or administrator who may be acting in the place of commissioners, may commence an action therefor against the executor or administrator; and such action may be continued, for the defendant, until it shall appear whether the estate is insolvent; and, if it should not prove to be so, the plaintiff may prosecute his action as if no such representation had been made.

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INDIANA.

*(Real Property. Revised Statutes, 1838.)*

Ch. 30, Sect. 7, enacts: That no action of disseisin shall be sustained by any person who shall not have had right of entry within twenty years next before the commencement of such action, unless such person shall have been, during such time, or part thereof, absent from the United States, infant, *feme covert*, or insane; and the time of such absence, infancy, coverture, or insanity, shall not be reckoned any part of the limitation aforesaid, provided such limitation commenced during such disability.

Ch. 36, Sect. 3, enacts: No action of ejectment shall be commenced or maintained, for the recovery of any lands or tenements, against any person or persons who may have been in the quiet and peaceable possession of the same, under an adverse title for twenty years, either in his own right, or the right of any other person or persons, under whom he claims; and any action of ejectment, commenced contrary to the provisions of this Act, shall be dismissed at the cost of the party commencing the same: *Provided, however*, that this Act shall not be so construed to affect any person who may be a *feme covert*, *non compos mentis*, a minor, or any person beyond the seas, within five years after such disability is removed.

*Personal Actions.*

Ch. 81, Sect. 12, enacts: All actions of debt on simple contract, and for rent arrear, actions on the case (other than for slander), actions of account, trespass, trespass *quare clausum fregit*, detinue, and replevin for goods and chattels, shall be commenced within five years after the cause of action accrued, and not after. All actions of trespass for assault and battery, and



for wounding and imprisonment, shall be commenced within three years after the cause of action accrued, and not after. All actions upon any act \* of assembly, now or hereafter to be made, when [\* cxxvi] the right of action is limited to the party aggrieved, shall be commenced within two years after the cause of action accrued, and not after, except when the right of action is limited by the Act to a shorter period; and all actions of slander shall be commenced within one year after the cause of action accrued, and not after, saving, however, the right of infants, *femes covert*, persons *non compos mentis*, or without the jurisdiction of the United States, until one year after their several disabilities are removed. *Provided, however*, that no statute of limitation shall ever be pleaded as a bar, or operate as such, to any action founded on an instrument or contract in writing, whether the same be sealed or unsealed, nor to running accounts between merchant and merchant: *And provided, also*, that if any person or persons against whom there is or shall be any of the causes of action specified in this section, be or shall be at the time of any such cause of action given or accrued, without the jurisdiction of the United States, that then such person or persons who is or shall be entitled to such action shall be at liberty to bring said actions against said person or persons, within one year after their return from without the United States: *And provided, further*, that nothing in this Act shall be so construed as in any manner to restrict or limit any defendant or defendants to any action in pleading, set-off, or payment thereto, to the amount of the plaintiff's cause of action: *And provided, also*, that, if in any of the said actions or suits, judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and for matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his writ, plaint, or bill; that in all such cases, and in cases discontinued for want of a court at any regular term, the plaintiff, his heirs, executors, or administrators, as the case may require, may commence a new action or suit, from time to time, within a year after such judgment reversed, or such judgment given against the plaintiff, or such discontinuance, and not after: *Provided, further*, that on all contracts made in this State, if the defendant shall be without the same when the cause of action accrued, said action shall not be barred until the times above limited shall have expired, after the defendant shall have come within the jurisdiction thereof, and on all contracts made without this State, if the defendant shall have left the State or territory where the same was made, and come within the jurisdiction of this State, before cause of action accrued thereon, the plaintiff shall not be barred his right of action, until the time above limited, after the said demand shall have been brought within the jurisdiction of this State.

[\*cxxvii]

\* ILLINOIS.

*Actions Real and Personal. (Revised Laws of Illinois, 1833.)*

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, that all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, trover, and replevin for taking away goods and chattels, all actions for arrearages of rent due on a parol demise, and all actions of account and upon the case, except actions for slander, and except, also, actions for malicious prosecution, and such actions as concern the trade of merchandise between merchant and merchant, their factors or agents, shall be commenced within five years next after the cause of such actions shall have accrued, and not after.

SECT. 2. That all actions of trespass for assault, battery, wounding, and imprisonment, or any of them, shall be commenced within two years next after the cause of such actions shall have accrued, and not after.

SECT. 3. That every action upon the case for words shall be commenced within one year next after the words spoken, and not after; and every action for malicious prosecution shall be commenced within two years next after the cause of action shall have accrued, and not after.

SECT. 4. That every action of debt or covenant for rent, or arrearages of rent, founded upon any lease under seal, and every action of debt or covenant founded upon any single or penal bill, promissory note, or writing obligatory, for the direct payment of money, or the delivery of property, or the performance of covenants, or upon any award under the hands and seals of arbitrators, for the payment of money only, shall be commenced within sixteen years after the cause of such action shall have accrued, and not after; but if any payment shall have been made on any such lease, single or penal bill, promissory note, writing obligatory, or award, within or after the said period of sixteen years, then an action instituted on such lease, single or penal bill, promissory note, writing obligatory, or award, within sixteen years after, such payment shall be good and effectual in law, and not after.

SECT. 5. That judgment in any court of record in this State may be revived by *scire facias*, or an action of debt may be brought thereon, within twenty years next after the date of such judgment, and not after.

SECT. 6. That no person who now hath, or hereafter may have, any right of entry into any lands, tenements, or hereditaments, shall make an entry therein, but within twenty years next after such right shall have accrued, and such person shall be barred from any entry afterwards.

[\* cxxviii] \* SECT. 7. That every real, possessory, ancestral, or mixed action, or writ of right, brought for the recovery of any lands, tenements, or hereditaments, shall be brought within twenty years next

after the right or title thereto, or cause of such action accrued, and not after: *Provided*, that in all the foregoing cases in this Act mentioned, where the person or persons who shall have right of entry, title, or cause of action is, are, or shall be at the time of such right of entry, title, or cause of action under the age of twenty-one years, insane, beyond the limits of this State, or *feme covert*, such person or persons may make such entry or institute such action, so that the same be done within such time as is within the different sections of this Act limited, after his or her becoming of full age, sane, *feme sole*, or coming within this State.

SECT. 8. That if any person or persons against whom there is or shall be any cause of action, as specified in the preceding sections of this Act, except real or possessory actions, shall be out of this State at the time of the cause of such action accruing, or any time during which a suit might be sustained on such cause of action, then the person or persons who shall be entitled to such action shall be at liberty to bring the same against such person or persons, after his, her, or their return to this State, and the time of such person's absence shall not be accounted or taken as part of the time limited by this Act.

SECT. 9. That if in any of the said actions, specified in any of the preceding sections of this Act, judgment be given for the plaintiff, and the same be reversed by writ of error, or upon appeal; or if a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff; or if the plaintiff be nonsuited, — then, if the time limited for bringing such action shall have expired during the pendency of such suit, the said plaintiff, his or her heirs, executors, or administrators, as the case shall require, may commence a new action within one year after such judgment reversed or given against the plaintiff, and not after.

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MICHIGAN.

*Limitations of Real Actions and Rights of Entry. (Revised Statutes, 1838.)*

SECTION 1. No person shall commence an action for the recovery of any lands, nor make an entry thereupon, unless within twenty years after the right to make such entry or bring such action first accrued, or within twenty-five years after he or those from, by, or under whom he claims shall have been seised or possessed of the premises, except as is hereinafter provided.

\* SECT. 2. If such right or title accrued to an ancestor or [\* cxxix] predecessor of the person who brings the action or makes the entry, or to any other person from, by, or under whom he claims, the said

twenty-five years shall be computed from the time when the right or title so first accrued to such ancestor, predecessor, or other person.

SECT. 3. In the construction of this chapter, the right to make an entry or bring an action to recover land shall be deemed to have first accrued at the times respectively hereinafter mentioned; that is to say:—

*First.* Whenever any person shall be disseised, his right of entry or of action shall be deemed to have accrued at the time of such disseisin.

*Second.* When he claims as heir or devisee of one who died seised, his right shall be deemed to have accrued at the time of such death, unless there is a tenancy by curtesy, or other estate, intervening after the death of such ancestor or deviser, in which case his right shall be deemed to accrue when such intermediate estate shall expire, or when it would have expired by its own limitation.

*Third.* When there is such an intermediate estate, and in all other cases when the party claims by force of any remainder or reversion, his right, so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitations, notwithstanding any forfeiture thereof for which he might have entered at an earlier time.

*Fourth.* The preceding clause shall not prevent any person from entering, when entitled to do so by reason of any forfeiture, or breach of condition; but, if he claims under such a title, his right shall be deemed to have accrued when the forfeiture was incurred or the condition was broken.

*Fifth.* In all cases not otherwise provided for, the right shall be deemed to have accrued when the claimant, or the person under whom he claims, first became entitled to the possession of the premises under the title upon which the entry or action is founded.

SECT. 4. If any minister, or other sole corporation, shall be disseised, any of his successors may enter upon the premises, or may bring an action for the recovery thereof, at any time within five years after death, resignation, or removal of the person so disseised, notwithstanding the twenty-five years after such disseisin shall have expired.

SECT. 5. If the person first entitled to make such entry or bring such action shall die within the age of twenty-one years, or be a married woman, insane, imprisoned in the state prison, or absent from the United States, and no determination or judgment shall have been had of or upon the title, right, or action which accrued to him, the entry may be made or the action brought by his heirs, or any other person claiming from, by, or under him, at any time within ten years after his death, notwithstanding the said twenty-five years shall have expired.

SECT. 6. No person shall be deemed to have been in possession of any lands, within the meaning of this chapter, merely by reason of having made an entry thereon, unless he shall have

continued in open and peaceable possession of the premises for the space of one year next after such entry, or unless an action shall be commenced upon such entry and seisin within one year after he shall be ousted or dispossessed of the premises.

SECT. 7. The limitations hereinbefore prescribed as to the time within which an action may be brought to recover any land, or an entry may be made thereupon, shall take effect from and after the thirty-first day of August, in the year of our Lord one thousand eight hundred and thirty-eight; and no action for the recovery of any land, nor any entry thereupon, shall be brought or made after the said thirty-first day of August, in any case where such action or entry shall be or shall have been barred on or before that day, by the statute of limitation in force at and immediately preceding the time when this chapter shall take effect as law.

SECT. 8. Where the cause or right of action or entry shall have accrued before the time when this chapter shall take effect as law, [the same] shall not be affected by this chapter, but all such causes of actions shall be determined by the law under which such right of action accrued.

SECT. 9. No descent or discontinuance which may hereafter occur shall take away or defeat any right of entry, or of action, for the recovery of real estate.

SECT. 10. When notice shall be given to prevent the acquisition of a right or privilege of way, air, or light, such notice shall be considered so far a disturbance of the right in question as to enable the party claiming such right to bring an action of the case, as for a nuisance or disturbance, for the purpose of trying the right; and, if the plaintiff in such action shall prevail, he shall be entitled to full costs, although he should recover only nominal damages.

SECT. 11. If any action of which the amercement is limited by this chapter shall be abated by the death of any party thereto, or if, after verdict for the demandant or plaintiff, the judgment shall be arrested, or, if judgment in any such action be given for the demandant or plaintiff, and the judgment shall be reversed for error therein, the demandant or plaintiff, or any person claiming from, by, or under him, may bring an action for the same cause, at any time within one year after the determination of the original action, or after the reversal of the judgment.

#### *Personal Actions.*

SECTION 1. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards; that is to say:

*First.* All actions of debt, founded upon any contract, or liability not under seal, except such as are brought upon the judgment or decree of \* some court of record, or of general equity jurisdiction, of the [\* cxxxi] United States, or of this or some other of the United States.

*Second.* All actions upon judgments rendered in any court other than those above excepted.

*Third.* All actions for arrearages of rent.

*Fourth.* All actions of assumpsit, or upon the case, founded on any contract or liability, express or implied.

*Fifth.* All actions for waste.

*Sixth.* All actions of replevin and trover, and all other actions for taking, detaining, or injuring goods or chattels.

*Seventh.* All other actions on the case, except actions for slanderous words, or for libels.

SECT. 2. All actions for trespass upon land, or for assault and battery, and for false imprisonment, and all actions for slanderous words, and for libels, shall be commenced within two years next after the cause of action shall accrue, and not afterwards.

SECT. 3. All actions against sheriffs, for the misconduct or neglect of their deputies, shall be commenced within four years next after the cause of action shall accrue, and not afterwards.

SECT. 4. None of the foregoing provisions shall apply to any action brought upon any bills, notes, or other evidences of debt issued by any bank.

SECT. 5. In all actions of debt or assumpsit, brought to recover the balance due upon mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

SECT. 6. If any person, entitled to bring any of the actions before mentioned in this chapter, shall, at the time when the cause of action accrues, be within the age of twenty-one years, or a married woman, insane, imprisoned in the state prison, or absent from the United States, such person may bring the said actions within the times in this chapter respectively limited, after the disability shall be removed.

SECT. 7. All personal actions on any contract, not limited by the foregoing sections, or by any other law of this State, shall be brought within twenty years after the accruing of the cause of action.

SECT. 8. When any person shall be disabled to prosecute an action in the courts of this State, by reason of his being an alien, subject, or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods herein limited for the commencement of any of the actions before mentioned.

SECT. 9. If, at the time when any cause of action mentioned in this chapter shall accrue against any person, he shall be out of the State, the action may be commenced, within the time herein limited therefor, after such person shall come into this State; and if, after any cause of action shall have accrued, the person against whom it has accrued shall be

absent \* from and reside out of the State, the time of his absence [\* cxxxii] shall not be taken as any part of the time limited for the commencement of the action.

SECT. 10. If any person entitled to bring any of the actions before mentioned in this chapter, or liable to any such actions, shall die before the expiration of the time herein limited, or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time within two years after the granting of the letters testamentary, or of administration, and not afterwards, if barred by the provisions of this chapter.

SECT. 11. If in any action, duly commenced within the time limited in this chapter and allowed therefor, the writ shall fail of a sufficient service or return, by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the writ shall be abated, or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form, or if, after a verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and, if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such action within said one year.

SECT. 12. If any person who is liable to any of the actions mentioned in this chapter shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within six years after the person who is entitled to bring the same shall discover that he has such cause of action, and not afterwards.

SECT. 13. In actions of debt or upon the case, founded on any contract, no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take a case out of the operation of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such acknowledgment or promise be made or contained by or in some writing signed by the party to be charged thereby.

SECT. 14. If there are two or more joint contractors, or joint executors or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason of any acknowledgment or promise made or signed by any other or others of them.

SECT. 15. In actions commenced against two or more joint contractors, or joint executors or administrators of any contractor, if it shall appear, on the trial or otherwise, that the plaintiff is barred by the provisions of this chapter as to one or more of the defendants, but is entitled to recover



against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff [\* cxxxiii] as to \* any of the defendants against whom he is entitled to recover, and for the other defendant or defendants against the plaintiff.

SECT. 16. If, in any action or contract, the defendant shall plead in abatement that any other person ought to have been jointly sued, it shall be a good replication to such plea, if true in fact, that the action was, by reason of the provisions of this chapter, barred against the person so named in the plea, but not so barred by reason of such acknowledgment or promise as against such defendant.

SECT. 17. Nothing contained in the four preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest, made by any person; but no indorsement or memorandum of any such payment, written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the provisions of this chapter.

SECT. 18. If there are two or more joint contractors or joint executors or administrators of any contractor, no one of them shall lose the benefit of the provisions of this chapter, so as to be chargeable by reason only of any payment made by any other or others of them.

SECT. 19. All the provisions of this chapter shall apply to the case of any debt or contract, alleged by way of set-off on the part of a defendant; and the time of the limitation of such debt shall be computed in like manner as if an action had been commenced therefor, at the time when the plaintiff's action was commenced, provided such debt or contract would have been barred by reason of the provisions of this chapter, before the origin of the claim or demand upon which such defendant was sued.

SECT. 20. The limitation hereinbefore prescribed for the commencement of actions shall apply to the same actions, when brought in the name of the State, or the people of the State, or in the name of any officer, or otherwise, for the benefit of the State, in the same manner as to actions brought by citizens.

SECT. 21. All actions and suits, for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given in the whole or in part, shall be commenced within one year next after the offence was committed, and not afterwards.

SECT. 22. If the penalty or forfeiture is given in whole or in part to the State, a suit therefor may be commenced by or in behalf of the State, at any time within two years after the offence committed, and not afterwards.

SECT. 23. The two preceding sections shall not apply to any suit which

is or shall be limited by any statute, to be brought within a shorter or longer time than is prescribed in these two sections, but such suit shall or may be brought within the time that may be limited by such statute.

SECT. 24. None of the provisions of this chapter respecting the \* acknowledgment of debt, or new promise to pay it, shall [\* cxxxiv] apply to any such acknowledgment or promise, made before the provisions of this chapter shall take effect as law; but every such last-mentioned acknowledgment or promise, although not made in writing, shall have the same effect as if no provision relating thereto had been herein contained.

SECT. 25. No personal action shall be maintained which, at or before the day when this chapter shall take effect as law, shall have been barred by the statute of limitation in force at any time before that day.

SECT. 26. This chapter shall take effect as law from and after the thirty-first day of August, in the year of our Lord one thousand eight hundred and thirty-eight.

SECT. 27. When the cause or right of action shall have accrued before the said thirty-first day of August, it shall not be affected by this chapter, but all such causes of action shall be determined agreeably to the law under which the right of action accrued.

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WISCONSIN.

*Concerning the Time of Commencing Actions. (Statutes of the Territory of Wisconsin, p. 258.)*

SECTION 1. The actions included within the provisions of this Act are either,

*First.* Such as relate to real estate.

*Second.* Those which may be brought for the recovery of any debt or demand, or for the recovery of damage only.

*Third.* Those which may be brought for penalties or forfeitures.

*Fourth.* Suits in courts of equity.

SECT. 2. The right of action of any person injured by any felony shall not in any case be merged in such felony, or be in any manner affected thereby.

SECT. 3. No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question, within twenty years before the commencement of such action.

SECT. 4. No avowry or cognizance of title to real estate, or to any rents or services, shall be valid, unless it appear that the person making the avowry, or the person in whose right the cognizance is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the \* premises in question, within twenty-four years before [*the*] committing the act in defence of which such avowry or cognizance is made.

SECT. 5. No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action be commenced thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

SECT. 6. In every action for the recovery of real estate, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for twenty years before the commencement of such action.

SECT. 7. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of any premises under the claim of title, exclusive of any other right, founding such claim upon some written instrument, or [*as*] being a conveyance of the premises in question, or upon the decree of [*or*] judgment of some competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises under such claim for twenty years, the premises so [*included shall be deemed to have been*] held adversely; except that, where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed the possession of any other lot of the same tract.

SECT. 8. For the purpose of constituting an adverse possession by any person claiming a title, founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases: —

*First.* Where it has been usually cultivated or improved.

*Second.* Where it has been protected by a substantial inclosure.

*Third.* Where, although not inclosed, it has been used for the supply of fuel or of fencing timber, for the purposes of husbandry, or the ordinary use of the occupant.

*Fourth.* Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared or not inclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

SECT. 9. Where it shall appear that there has been an actual, continued occupation of any premises, under a claim of title exclusive of any other right, but not founded upon any written instrument or any judgment or decree, the premises so actually occupied, and no other, shall be deemed to be held adversely.

\* SECT. 10. For the purpose of constituting an adverse pos- [\* cxxxvi] session by a person claiming title not founded upon some written instrument, or some judgment or decree, land shall be deemed to have been possessed and occupied in the following cases only: —

*First.* Where it has been protected by a substantial inclosure.

*Second.* Where it has been usually cultivated or improved.

SECT. 11. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord until the expiration of twenty years from the termination of the tenancy, or where there has been no written lease until the expiration of twenty years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title, or may have claimed to hold adversely to his landlord; but such presumption shall not be made after the periods herein limited.

SECT. 12. The right of any person to the possession of any real estate shall not be impaired or affected by a descent being cast in consequence of the death of any person in possession of such estate.

SECT. 13. If any person entitled to commence any action in this Act specified, or to make any entry, avowry, or cognizance, be, at the time such title shall first descend or accrue, either,

*First.* Within the age of twenty-one years; or,

*Second.* Insane; or,

*Third.* Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence for any term less than for life; or,

*Fourth.* A married woman, —

The time during which such disability shall continue shall not be deemed any portion of the time in this Act limited for the commencement of such suit, or the making such entry, avowry, or cognizance. But such person may bring such action, or make such entry, avowry, or cognizance, after the said time so limited, and within ten years after such disability is removed, but not after that period.

SECT. 14. If the person entitled to commence such action, or to make such entry, avowry, or cognizance, shall die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of the title, right, or action to him accrued, his heirs may commence such action, or make such entry, avowry, or cognizance, after the time in this Act limited for that purpose, and within ten years after his death, but not after that period.

SECT. 15. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards:—

*First.* All actions of debt founded upon any contract or liability, not under seal, except such as are brought upon the judgment or decree of some court of record of the United States, or of any State or Territory of the United States.

*Second.* All actions upon judgments rendered in any court not being a court of record.

[\* cxxxvii] \* *Third.* All actions for arrears of rent.

*Fourth.* All actions of assumpsit, or upon the case, founded on any contract or liability, expressed or implied.

*Fifth.* All actions for waste, and for trespass upon land.

*Sixth.* All actions for replevin, and all other actions for taking, detaining, or injuring goods or chattels.

*Seventh.* All other actions on the case, except actions for slanderous words and for libels.

SECT. 16. All actions for assault and battery and for false imprisonment, and all actions for slanderous words and for libels, shall be commenced within two years next after the cause of action shall accrue, and not afterwards.

SECT. 17. All actions against sheriffs or other officers, for the escape of persons imprisoned on civil process, shall be commenced within one year from the time of such escape, and not after.

SECT. 18. All actions against sheriffs and coroners, upon any liability incurred by them, by the doing of any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within three years after the cause of action shall have accrued, and not after that period.

SECT. 19. None of the foregoing provisions shall apply to any action brought upon a promissory note which is signed in the presence of an attesting witness, provided the action be brought by the original payee, or by his executor or administrator; nor to an action brought upon any bills, notes, or other evidences of debt issued by any bank.

SECT. 20. In all actions of debt or assumpsit brought to recover the balance due upon a mutual and open account current, the cause of action shall be deemed to have accrued at the time of the last item proved in such account.

SECT. 21. If any person entitled to bring any of the actions before-mentioned in this Act shall, at the time when the cause of action accrues, be within the age of twenty-one years, or a married woman, insane, imprisoned, or absent from the United States, such person may bring the said actions within the times in this Act respectively limited after the disability shall be removed.

SECT. 22. All personal actions on any contract not limited by the foregoing sections, or by any other law in this Territory, shall be brought within twenty years after the accruing of the cause of action.

SECT. 23. When any person shall be disabled to prosecute an action in the courts of this Territory, by reason of his being an alien, subject, or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods herein limited for the commencement of any of the actions before-mentioned.

SECT. 24. If, at the time when any cause of action mentioned in this \* Act shall accrue against any person, he shall [\* cxxxviii] be out of the Territory, the action may be commenced within the time herein limited therefor after such person shall come into the Territory; and if, after any cause of action shall have accrued, the person against whom it has accrued shall be absent from and reside out of the Territory, the time of the absence shall not be taken as any part of the time limited for the commencement of the action.

SECT. 25. If any person entitled to bring any of the actions before-mentioned in this Act, or liable in any such action, shall die before the expiration of the time herein limited therefor, or within thirty days after the expiration of the said time, and if the cause of action does by law survive, the action may be commenced by or against the executor or administrator of the deceased person, as the case may be, at any time within two years after the grant of letters testamentary or of administration, and not afterwards, if barred by the provisions of this Act.

SECT. 26. If, in any action duly commenced within the time in this Act limited and allowed therefor, the process shall fail of a sufficient service or return by any unavoidable accident, or by any default or neglect of the officer to whom it is committed, or if the process shall be abated or the action otherwise avoided or defeated by the death of any party thereto, or for any matter of form, or if after a verdict for the plaintiff the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein; and, if the cause of action does by law survive, his executor or administrator may, in case of his death, commence such new action within the said one year.

SECT. 27. If any person who is liable to any of the actions mentioned in this Act shall fraudulently conceal the cause of such action from the knowledge of the person entitled thereto, the action may be commenced at any time within six years after the person who is entitled to bring the same shall discover that he has such cause of action, and not afterwards.

SECT. 28. If there are two or more joint contractors or joint executors

or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the provisions of this Act, so as to be chargeable by reason only of any acknowledgment or promise made by any other or others of them.

SECT. 29. In actions commenced against two or more joint contractors or joint executors or administrators of any contractor, if it shall appear, on the trial or otherwise, that the plaintiff is barred by the provisions of this Act as to one or more of the defendants, but is entitled to recover against any other or others of them, by virtue of a new acknowledgment or promise, or otherwise, judgment shall be given for the plaintiff as to any [\* cxxxix] of the defendants \* against whom he is entitled to recover, and for the other defendant or defendants, against the plaintiff.

SECT. 30. If in any action on contract the defendant shall plead in abatement that any other person ought to have been jointly sued, and issue be joined on that plea, and if it shall appear on the trial that the action was, by reason of the provisions of this Act, barred against the persons so named in the plea, the said issue shall be found for the plaintiff.

SECT. 31. Nothing contained in the three preceding sections shall alter, take away, or lessen the effect of a payment of any principal or interest made by any person; but no indorsement or memorandum of any such payment written or made upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, or purport to be made, shall be deemed sufficient proof of the payment, so as to take the case out of the operation of the provisions of this Act.

SECT. 32. If there are two or more joint contractors, or joint executors or administrators of any contractor, no one of them shall lose the benefit of the provisions of this Act, so as to be chargeable by reason only of any payment made by any other or others of them.

SECT. 33. All the provisions of this Act shall apply to the case of any debt on contract, alleged by way of set-off on the part of a defendant; and the time of limitation of such debt shall be computed in like manner as if an action had been commenced therefor at the time when the plaintiff's action was commenced.

SECT. 34. All actions and suits for any penalty or forfeiture on any penal statute brought by the Territory, or any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within two years next after the offence is committed, and not afterwards.

SECT. 35. The two preceding sections shall not apply to any suit which is or shall be limited by any statute to be brought within a shorter time than is prescribed therein; but such suit shall be brought within the time that may be limited by such statute.

SECT. 36. Every judgment and decree in any court of record of the United States, or of any State or Territory of the United States, shall be



presumed to be paid and satisfied at the expiration of twenty years after the judgment or decree was rendered.

SECT. 37. Whenever there is a concurrent jurisdiction in the courts of common law and in courts of equity of any cause of action, the provisions of this Act, limiting a time for the commencement of a suit for such cause of action in a court of common law, shall apply to all suits hereafter to be brought for the same cause in the court of chancery.

SECT. 38. The last section shall not extend to suits over the subject-matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject-matter is not cognizable in the courts of common law.

\* SECT. 39. Bills for relief, on the ground of fraud, shall be filed [\* cxi] within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time.

SECT. 40. Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after.

SECT. 41. If the person entitled to file any bill specified in the two last sections be, at the time of discovering the facts constituting such fraud, or at the time the cause for filing such bill shall accrue, under any of the disabilities enumerated in this Act, the time during which such disabilities shall continue shall be excepted from the limitations contained in the two last sections, in the same manner and with the like effect as such time as herein excepted from the limitation prescribed for commencing actions at law; and, in case of the death of the person so entitled, during such disability or before the expiration of the time herein limited for filing such bills, the same may be filed by the heirs or representatives of such person, as the case may require, within the same time as allowed in this Act for commencing actions at law in the like cases.

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MISSOURI.

*Real Property. (Revised Statutes, 1835.)*

SECTION 1. No action for the recovery of any lands, tenements, or hereditaments, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within twenty years before the commencement of such action.

SECT. 2. No entry upon any lands, tenements, or hereditaments shall be deemed sufficient or valid as a claim, unless an action be commenced

thereupon within one year after the making of such entry, and within twenty years from the time when the right to make such entry descended or accrued.

SECT. 3. The right of any person to the possession of any lands, tenements, or hereditaments shall not be impaired or affected by a descent cast in consequence of the death of any person in possession of such estate.

SECT. 4. If any person entitled to commence any action in this article specified, or to make any entry, be, at the time such title shall first descend or accrue, either,

- First.* Within the age of twenty-one years ; or,
- [\* cxli] \* *Second.* Insane ; or,
- Third.* Imprisoned on any criminal charge, or in execution upon some conviction of a criminal offence, for any term less than life ; or,
- Fourth.* A married woman, —

The time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of such suit, or the making such entry, but such person may bring such action, or make such entry, after the time so limited, and within ten years after such disability is removed, but not after that period.

SECT. 5. If any person entitled to commence such action, or to make such entry, die during the continuance of any disability specified in the preceding section, and no determination or judgment be had of the title, right, or action to him accrued, his heirs may commence such action, or make such entry, at the time in this article limited for that purpose, and within ten years after his death, but not after that period.

#### *Personal Actions.*

SECTION 1. The following actions shall be commenced within ten years after the cause of such action accrued, and not after : —

*First.* All actions of debt founded on any writing, whether sealed or unsealed.

*Second.* All actions of assumpsit founded on any writing for the direct payment of money.

SECT. 2. The following actions shall be commenced within five years after the cause of such action accrued, and not after : —

*First.* All actions of debt founded upon any contract or liability, and not in this Act otherwise specially limited, nor brought upon any judgment or decree of any court.

*Second.* All actions for the recovery of any penalty or forfeiture given by any statute of this State.

*Third.* All actions of trespass upon real or personal property.

*Fourth.* All actions of account, detinue, assumpsit, trover, or trespass on the case, and not in this Act otherwise limited.

SECT. 3. The following actions shall be commenced within two years after the cause of such action accrued, and not after :—

*First.* All actions on open accounts for goods, wares, and merchandise sold and delivered.

*Second.* All actions for any article in a store account.

*Third.* All actions for assault and battery.

*Fourth.* All actions for false imprisonment.

SECT. 4. The following actions shall be commenced within one year after the cause of such action accrued, and not after :—

*First.* All actions of replevin.

\* *Second.* All actions for slanderous words spoken. [\* cxlii]

SECT. 5. If any person entitled to bring an action in this article specified at the time the cause of action accrued, be, either,

*First.* Within the age of twenty-one years ; or,

*Second.* Insane ; or,

*Third.* Imprisoned on a criminal charge, or in execution, under a sentence of a criminal court, for a term less than for his natural life ; or,

*Fourth.* A married woman, —

Such persons shall be at liberty to bring such actions within the respective times in this article limited, after such disability is removed.

SECT. 6. If any person entitled to bring any action in this article specified die before the expiration of the time herein limited for the commencement of such suit, if such cause of action shall survive to his representatives, his executor or administrator may, after the expiration of such time, and within one year after such death, commence such action, but not after that period.

SECT. 7. If, at the time when any cause of action specified in this article accrues against any person, he be out of this State, such action may be commenced within the times herein respectively limited, after the return of such person into the State ; and if, after such cause of action shall have accrued, such person depart from and reside out of this State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

#### *General Provisions.*

SECTION 1. Whenever any person shall be disabled to prosecute in the courts of this State, by reason of his being an alien, subject, or citizen of any country at war with the United States, the time of the continuance of such war shall not be deemed any part of the respective periods limited in the preceding articles of this Act for the making of an entry or the commencement of any action.

SECT. 2. The preceding section shall not apply to actions for any penalty or forfeiture given by any statute of this State.

SECT. 3. If any action shall have been commenced within the times

respectively prescribed in the preceding articles of this Act, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or, after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered, or such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff.

SECT. 4. If any action shall have been commenced within the [\* cxliii] times \* respectively prescribed in the preceding articles of this Act, and the defendant in such suit die before judgment, and if the right of action be such as survives against the representatives of the defendant, the plaintiff may commence a new action against the heirs, executors, or administrators of such defendant, as the case may require, within one year after such death, or, if no executors or administrators be appointed within that time, then within one year after letters testamentary or of administration shall have been granted to them.

SECT. 5. When an action commenced within the time prescribed by law shall abate by reason of the death of the plaintiff, if the right of action survive to his representatives, his executor or administrator may, within one year after such death, commence a new action, if the cause of such action would otherwise survive; and, if any action so commenced by an executor or administrator abate by the death of the plaintiff, a new action may be commenced by the administrator of the same estate at any time within one year after such abatement.

SECT. 6. Whenever the commencement of any suit shall be stayed by an injunction of any court of equity, the time during which such injunction shall be in force shall not be deemed any portion of the time in this Act limited for the commencement of such suit.

SECT. 7. No person shall avail himself of any disability enumerated in this Act, unless such disability existed at the time his right of action or of entry accrued.

SECT. 8. If any person, by absconding, or concealing himself, or by any other improper act of his own, prevent the commencement of any action in this Act specified, such action may be commenced within the times herein respectively limited after the time the commencement of such action shall have ceased to be so prevented.

SECT. 9. When there are two or more disabilities existing at the time the right of action or entry accrued, the limitation herein prescribed shall not attach until all such disabilities be removed.

SECT. 10. The provisions of this Act shall not extend to any section which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.

SECT. 11. The provisions of this Act shall not apply to any actions commenced, nor to any cases where the right of action or of entry shall have accrued, before the time when this Act takes effect, but the same shall remain subject to the laws now in force.

*Presumption of Payment.*

SECTION 1. Every judgment and decree of any court hereafter rendered or made shall be presumed to be paid and satisfied after the expiration of twenty years from the time of giving such judgment or decree; and every judgment and decree rendered or made at the time this Act shall

\* take effect, shall be presumed to be paid and satisfied after the [\* cxliv] expiration of twenty years from the time this Act shall take effect;

but in any suit at law or equity in which the party against whom such judgment or decree was rendered, or his heirs or personal representatives, shall be a party, such presumption may be repelled by proof of payment, or of written acknowledgment of indebtedness, made within twenty years, of some part of the amount recovered by such judgment or decree. In all other cases it shall be conclusive.

SECT. 2. Every sealed instrument of writing, for the payment of money hereafter made, shall be presumed to be paid and satisfied after the expiration of twenty years from the time such action shall accrue; and every sealed instrument of writing, for the payment of money heretofore made, shall be presumed to be paid and satisfied after the expiration of twenty years from the time this Act shall take effect and such right of action shall accrue; but such presumption may be repelled by proof of payment of some part, or by proof of a written acknowledgment of such right of action, within that period.

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ARKANSAS.

*Revised Statutes of the State of Arkansas, 1838. Ch. 91.*

SECTION 1. No action for the recovery of any lands or tenements, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within ten years before the commencement of such suit.

SECT. 2. No entry upon lands or tenements shall be deemed sufficient or valid as a claim, unless an action be commenced thereon within one year after such entry, and within ten years from the time when the right to make such entry descended or accrued.

SECT. 3. The right of any person to the possession of any lands or tene-

ments shall not be impaired or affected by a descent cast in consequence of the death of any person in possession of such estate.

SECT. 4. If any person entitled to commence any action in the preceding sections specified, or to make an entry, be, at the time such title shall first descend or accrue, first, within the age of twenty-one years; second, insane; third, beyond the limits of the State; or, fourth, a married woman, — the time during which such disabilities shall continue shall not be deemed any portion of the time in this Act limited for the commencement of such suit or the making such entry; but such person may bring [\* cxlv] such action, or \* make such entry, after the time so limited, and within five years after such disability is removed, but not after that period.

SECT. 5. If any person entitled to commence any such action, or make such entry, die during the continuance of such disability specified in the preceding section, and no termination or judgment be had of the title, right, or action to him accrued, his heirs may commence such action, and make such entry, after the time in this Act limited for that purpose, and within five years after his death, and not after that period.

SECT. 6. The following actions shall be commenced within three years after the passage of this Act, or, when the cause of action shall not have accrued at the taking effect of this Act, within three years after the cause of action shall accrue: First, all actions of debt founded upon any contract, obligation, or liability (not under seal), excepting such as are brought upon the judgment or decree of some court of record of the United States, or of this or some other State; second, all actions upon judgments rendered in any court not being a court of record; third, all actions for arrearages of rent (not reserved by some instrument in writing, under seal); fourth, all actions of account, assumpsit, or on the case, founded on any contract or liability, expressed or implied; fifth, all actions for trespass on lands, or for libels; sixth, all actions for taking or injuring any goods or chattels.

SECT. 7. The following actions shall be commenced within one year after the cause of action shall accrue, and not after: First, all special actions on the case, for criminal conversation, assault and battery, and false imprisonment; second, all actions for words spoken, slandering the character of another; third, all words spoken, whereby special damages are sustained.

SECT. 8. All actions against sheriffs, or other officers, for the escape of any person imprisoned on civil process, shall be commenced within one year from the time of such escape, and not after.

SECT. 9. All actions against sheriffs and coroners, upon any liability incurred by them, by the doing any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within two years after the cause of action shall have accrued, and not thereafter.

SECT. 10. All actions upon penal statutes where the penalty, or any

part thereof, goes to the State, or any county, or person suing for the same, shall be commenced within two years after the offence shall have been committed, or the cause of action shall have accrued.

SECT. 11. All actions not included in the foregoing provisions shall be commenced within five years after the cause of action shall have accrued.

SECT. 12. In all actions of debt, account, or assumpsit, brought to recover any balance due upon a mutual open account current, the cause of action shall be deemed to have accrued from the time of the last item proved in such account.

SECT. 13. If any person entitled to bring any action in the preceding \*seven sections mentioned, except in actions against [\* cxlvi] sheriffs for escapes and actions of slander, shall, at the time the cause of action accrued, be either within the age of twenty-one years, or insane, or beyond the limits of this State, or a married woman, such person shall be at liberty to bring such action within the time specified in this Act, after such disability is removed.

SECT. 14. No verbal promise or acknowledgment shall be deemed sufficient evidence in any action founded on a simple contract, whereby to take any case out of the operation of this Act, or to deprive the party of the benefits thereof.

SECT. 15. When there shall be two or more joint contractors or executors, no such joint contractor or executor shall lose the benefit of this Act by reason of any written acknowledgment or promise made and signed by any of the other joint contractors or executors. Nothing in this section contained shall be so construed as to alter, take away, or lessen the effect of any payment of any principal or interest made by any person whatever, on any such joint contract.

SECT. 16. In actions against two or more such joint contractors or executors, although it shall appear at the trial that the plaintiff is barred by this Act as to one or more of the joint contractors or executors, yet he shall be entitled to recover against other of such joint defendants by virtue of a new acknowledgment or promise, and judgment may be given, and costs allowed to the plaintiff, as to the defendant against whom he shall recover, and to the other defendant against the plaintiff.

SECT. 17. If any defendant, in any action founded on any simple contract, shall plead any matter in abatement, to the effect that any other person ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of this Act, be maintained against the other person named in such plea, the issue joined on such plea shall be found against the party pleading the same.

SECT. 18. None of the provisions of this Act shall apply to suits brought to enforce payment on bills, notes, or evidences of debt issued by any bank or moneyed corporation.



SECT. 19. If any person entitled to bring any action in the preceding provisions of this Act specified, die before the expiration of the time herein limited for the commencement of such suit, and such cause of action shall survive to his representatives, his executors or administrators may, after the expiration of such time, and within one year after such death, commence such suit, but not after that period.

SECT. 20. If, at any time when any cause of action specified in this Act accrues against any person, he be out of the State, such action may be commenced within the times herein respectively limited, after the return of such person into the State; and if, after such cause of action [\* cxlvii] shall have accrued, \*such person depart from and reside out of the State, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

SECT. 21. If any action shall be commenced within the times respectively prescribed in this Act, and the plaintiff therein suffer a nonsuit, or, after a verdict for him, the judgment be arrested, or, after judgment for him, the same be reversed on appeal or writ of error, such plaintiff may commence a new action, from time to time, within one year after such nonsuit suffered or judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff.

SECT. 22. If any action shall have been commenced within the times respectively prescribed in the provisions of this Act, and the defendant in such suit die before judgment, and if the right of action be such as survives against the representatives of the defendant, the plaintiff may commence a new action against the heirs, executors, or administrators of such defendant, as the case may require, within one year after such death; or, if no executor or administrator be appointed within the time, then within one year after letters testamentary or of administration shall have been granted.

SECT. 23. When an action commenced within the time prescribed by law shall abate by reason of the death of the plaintiff, if the right of action survive to his representatives, his executor or administrator may, within one year after such death, commence a new action; and if any action so commenced by an executor or administrator abate by the death of the plaintiff, a new action may be commenced by the administrator of the same estate at any time within one year after such abatement.

SECT. 24. Whenever the commencement of any suit shall be stayed by an injunction of any court of equity, the time during which such injunction shall be in force shall not be deemed any portion of the time in this Act limited for the commencement of such suit.

SECT. 25. No person shall avail himself of any disability in this Act

mentioned, unless such disability existed at the time the right of action accrued.

SECT. 26. If any person, by leaving the country, absconding or concealing himself, or any other improper act of his own, prevent the commencement of any action in this Act specified, such action may be commenced within the times respectively limited, after the commencement of such action shall have ceased to be so prevented.

SECT. 27. When two or more disabilities are existing at the same time the right of action or entry accrued, the limitation herein prescribed shall not attach until all such disabilities are removed.

SECT. 28. The provisions of this Act shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute.

\* SECT. 29. The presumption of payment shall apply to all [\* cxlvi] judgments of any of the courts of record in this State, rendered prior to the passage of this Act, in the same manner as such presumption applies to sealed instruments.

SECT. 30. Every judgment or decree which may hereafter be rendered in any court of this State, or elsewhere, shall be presumed to be paid and satisfied after the expiration of ten years from the time of rendering the same; but if in any suit at law, or in equity, in which the party against whom such judgment or decree may have been rendered, his heirs or personal representatives shall be a party, such presumption shall be repelled by proof of payment, or a written acknowledgment of indebtedness, made within ten years, of some part of the amount recovered by such judgment or decree. In all other cases such presumption shall be conclusive.

SECT. 31. After the expiration of ten years from the time the right of action shall accrue upon any instrument for the payment of money or the delivery of property, such right shall be presumed to have been extinguished by payment; but such presumption may be repelled by proof of the payment of some part thereof, or by proof of a written acknowledgment of such right of action, within that period.

SECT. 32. No indorsement of any payment written upon any bond, or any other sealed instrument, by or on behalf of the party to whom such payment shall be made, shall be deemed a sufficient proof of such payment, so as to take the case out of the operation of this Act.

SECT. 33. The provisions of this Act shall be deemed and taken to apply to the case of any debt or simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

SECT. 34. No action shall be maintained whereby to charge any person, upon any promise made after full age, to pay any debt contracted during infancy, unless such promise or satisfaction shall be made by some writing signed by the party to be charged therewith.

SECT. 35. All actions against the purchaser, his heirs or assigns, for the recovery of the lands sold by any collector of the revenue for the non-payment of taxes, and for lands sold at judicial sales, shall be brought within five years after the date of such sale, and not thereafter; saving to minors, persons of unsound mind, and persons beyond seas, the period of three years after such disability shall have been removed.

[\* cxlix]

\* FLORIDA.

(From THOMPSON'S Digest of the Statute Law of the State of Florida.)

## CHAPTER I.

## OF THE GENERAL ACT OF LIMITATIONS.

SECTION 1. *Of the Time within which Real and Personal Actions shall be sued, &c.*

1. ALL writs of *formedon in descender, remainder, or reverter*, of any lands, tenements, or hereditaments whatsoever, hereafter to be brought upon any title or cause heretofore accrued, or which may hereafter fall or accrue, shall be sued out within twenty years next after such title or cause of action accrued, and not afterward; and no person or persons who now hath, or have, or hereafter may have any right or title of entry into any lands, tenements, or hereditaments, shall make an entry but within twenty years next after such right or title accrued, and such person shall be barred from any entry afterward.

2. If any person or persons entitled to such writ or writs, or to such right or title of entry as aforesaid, shall be or were under the age of twenty-one years, *feme covert, non compos mentis*, imprisoned, or not within this State, at the time of such right or title accrued, or coming to them, every such person, and his or her heirs, shall and may, notwithstanding the said twenty years are or shall be expired, bring and maintain his action, or make his entry, within ten years next after such disabilities removed, or the death of the person so disabled, and not afterward.

3. In all writs of right and other actions possessory, any person may maintain a writ of right upon the possession or seisin of his ancestor or predecessor within fifty years; or any other possessory action upon the possession or seisin of his or her ancestor or predecessor, within forty years next before the teste of writ; but no person shall maintain a real action upon his own possession or seisin, but within thirty years next before the teste of the writ.

4. All actions of trespass *quare clausum fregit*, and all actions of trespass, detinue, actions *sur trover*, and replevin for taking away of goods and chattels; all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants; all actions of assumpsit or debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent; all actions of assault, menace, battery, wounding, and imprisonment, or any of them, which shall be sued or brought, — shall be commenced

\* and sued within the time and limitation hereafter expressed, and [\* cl] not after; that is to say, the said actions upon the case other than for slander, and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods and chattels, and the said actions of trespass *quare clausum fregit*, within five years next after the cause of such action or suit, and not after; and the said actions of trespass, assault, battery, wounding, imprisonment, or any of them, within three years next after the cause of such actions or suits, and not after; and the said actions upon the case for words, within one year next after the words spoken, and not after.

5. All actions or suits founded upon any account for goods, wares, or merchandise sold and delivered, or for any article charged in any book account, shall be commenced and sued within two years next after the arising of the cause of such action or suit, or the delivery of such goods, wares, and merchandise, and not after; except that, in the case of the death of such creditors or debtors before the expiration of the said term of two years, the further time of two years from the death of such creditor or debtor shall be allowed for the commencement of such actions or suits.

6. To prevent imposition or deception herein, the respective time or date of the delivery of the several articles charged in any such account, or any receipt taken for the delivery of them, shall be particularly specified; and if any merchant or trader shall wilfully postdate any article or articles in such account, or the receipt taken for the delivery of them, he shall forfeit and pay tenfold the amount of the article or articles so postdated, to be recovered with costs by warrant where the penalty does not exceed twenty dollars, and by action of debt in any court of record where the penalty shall exceed that sum.

7. To prevent any doubt in the construction hereof, it is hereby declared that the before-mentioned limitation of two years shall take place and be computed from the respective dates or times of delivery of the several articles entered or charged in any such account; and that all such articles as shall have been of more than two years' standing, when the action or suit was commenced, shall be disallowed and rejected, and verdict shall be given or judgment rendered for no more than the amount of such articles

as appear to have been actually charged or delivered within two years next before the commencement of the suit as aforesaid.

8. If, in any of the said actions or suits, judgment be given for the plaintiff, and the same be afterwards reversed by error, or a verdict pass for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ, or bill, in all such cases the party plaintiff, his heirs, executors, or administrators (as the case shall require), may commence a new action or suit from time to time within one year next after such judgment reversed, or such judgment given against the plaintiff, and not after.

[\*cli] \* SECT. 2. *What shall save the Operation of the Statute.*

1. If any person or persons that is or shall be entitled to any such actions of trespass, detinue, actions *sur trover*, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, be, or shall be at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, beyond the seas, or out of the country, then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, or returned from beyond the seas or from without this country, as by other persons having no such impediment should be done.

2. Whereas doubts have been suggested as to the true intent and meaning of the use of the terms "beyond seas or out of the country," used in the several Acts of limitations heretofore or now of force in this State; for remedy whereof, —

*Be it enacted*, that the saving in the Act of November the tenth, one thousand eight hundred and twenty-eight, and all other Acts of limitation in favor of persons "beyond the seas or out of the country," until such person shall have returned from beyond the seas or from without the country, shall not be held, deemed, or taken to extend to persons who were not at the time of the making of the contract, or accruing of the cause of action, domiciled or resident within the limits of this State; but all such persons shall be put upon the same footing, and shall have no other or greater rights than are possessed by residents and citizens of the State.

3. All suits hereafter brought, in the name or names of any person or persons residing beyond the seas or out of this country, for recovery of any debt due for goods actually sold and delivered here by his or their factor or factors, shall be commenced and prosecuted within the time appointed and limited by this Act for bringing the like suits, and not after, notwithstanding the saving hereinbefore contained to persons beyond the seas at the time of their causes of action accrued: *Provided, nevertheless,*

that if any factor shall happen to die before the expiration of the time in which suit should have been brought, such principal shall be allowed two years from the death of such factor to commence and prosecute his, her, or their action for any debt due to him, her, or them on account of any contract or dealing with such factor.

4. If any person or persons, defendant or defendants to any of the aforesaid actions, shall abscond or conceal themselves, or, by removal out of the country or the county where he or they do or shall reside, when such cause of action accrued, or by other indirect ways and means, defeat or obstruct any person or persons who have title thereto, from bringing or maintaining all or any of the aforesaid actions within the respective times \* limited by this Act, that then and in such case such de- [\* clii] fendant or defendants are not to be admitted to plead this Act in bar to any of the aforesaid actions, any thing in this Act in any wise to the contrary notwithstanding.

### SECT. 3. *Of Suits against Executors and Administrators.*

1. If any suit be brought against any executor or administrator, or other person having charge of the estate of a testator or an intestate, for the recovery of debt due upon an open account, it shall be the duty of the court before whom such suit shall be brought, to cause to be expunged from such account every item thereof which shall appear to have been due five years before the death of the testator or intestate ; saving to all person *non compos mentis*, *femes covert*, infants, imprisoned, or out of this State, who may be plaintiffs in such suits, three years after their several disabilities shall be removed ; and, if any person shall wilfully postdate any such account, he shall forfeit and pay tenfold the amount of the articles so postdated ; to be recovered in any court of record where the penalty incurred shall exceed twenty dollars, and by warrant before a justice of the peace where the penalty incurred shall not exceed that sum.

2. No action of debt shall be brought against any executor or administrator, or other person having charge of the estate of a testator or intestate, upon a judgment obtained against his testator or intestate ; nor shall any *scire facias* be issued against any executor or administrator, or other person having charge of the estate as aforesaid, to revive such judgment after the expiration of five years from the qualification of his executor or administrator, or of such other person having charge of the estate ; and all such judgments, after the expiration of five years upon which no proceeding shall have been had, shall be deemed to have been paid and discharged ; saving to all persons *non compos mentis*, *femes covert*, infants, imprisoned, or out of this State, who may have been entitled to the benefits of such judgments, three years after these several disabilities shall be removed.

## CHAPTER II.

OF THE CASES WHEREIN THE LAW OF THE PLACE OF THE CONTRACT  
MAY BE PLEADED.

1. In all suits now pending, or that may be hereafter instituted in the courts of this State, upon any cause of action originating in any foreign state or place, any law or statute of limitation of such foreign state or place may be pleaded: *Provided, however*, that such plea shall in no case be adjudged sufficient, unless it shall be made to appear before the court wherein it is pleaded, that such law or statute of limitations had completely run upon and barred the action in such foreign state or place before [\*cliii] \*the defendant had ceased to be a resident thereof, and had removed therefrom.

2. Any person, an inhabitant or resident of this State, who shall be sued within the same, upon any contract made or liability accruing in any foreign country, or beyond the limits of this State, upon which contract or liability suit would be barred by the law of the place where the contract was made or the liability originated, then in every such case the defendant may plead such law in effectual bar of the suit thereon in this State.

*Tit. III. Ch. 2, § 8, art. 6.*

All debts and demands, of whatever nature, against the estate of any testator or intestate, which shall not be exhibited within the said two years, shall for ever afterward be barred: *Provided*, that the executor or administrator shall, by an advertisement, to be published once a week for the space of four weeks in some newspaper printed in this State, give notice to all creditors, legatees, and persons entitled to distribution, that their claims and demands will be barred at the expiration of the period aforesaid, unless exhibited within the same; saving, however, to married women, infants, persons of unsound mind, imprisoned, or beyond the limits of the United States, in the military or naval service thereof during war, the said term of two years after their respective disabilities shall be removed, to exhibit their respective demands to said executors or administrators.

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 TEXAS.

(From HARTLEY'S Digest of the Laws of Texas.)

*Act of December 20, 1836.*

ART. 2375 (39). Any actual settler, who is a citizen of this republic, who may have and hold peaceable possession of any tract or parcel of land,



under a color of title duly proven and recorded in the proper county, for a term of five years from and after recording of said color of title or titles, his, her, or their claim shall be considered good and valid, barring the claim or claims of any and every person whatsoever, — minors, *femes covert*, and persons *non compos mentis*, excepted, who shall have and be allowed two years after their maturity, marriage, or return to sound mind, to demand and commence an action for his, her, or their claims, and no more. A peaceable possession can only be interrupted by an actual suit being instituted and prosecuted agreeably to the due forms of law against the holder or holders thereof. *Provided*, that this Act shall not affect the rights of any person who may have been prevented from complying with the provisions \* of the law by reason of the enemy having had pos- [\* cliv] session of the country, or for want of a proper court or officer having been established in due time; *and provided, further*, that this Act shall not give validity to claims unlawfully obtained from government.

*Act of January 20, 1840.*

ART. 2376 (11). *Be it further enacted*, that if, during the coverture, a sale of any of the lands or slaves of the wife be illegally effected, no limitation shall commence to run during the coverture, and, should the wife survive the dissolution of the marriage, she may sue for and recover such property; should the wife survive the dissolution, but not the time allowed by the law of limitations, then the running of such laws shall cease until all the children of the deceased mother shall have arrived at the age of majority, or those under that age shall have married, and the heirs of the wife shall have the unexpired time allowed by the law of limitations within which to institute their suit for the recovery of said property; and, if the wife shall not survive the dissolution of the marriage, the laws of limitations shall not commence running, as to the children of the deceased mother, until all the children shall have arrived at the age of majority, or those under that age shall have married.

*Act of February 5, 1841.*

ART. 2377 (1). *Be it enacted, &c.*, that, from and after the approval or final passage of this Act, all actions of trespass for injury done to the estate or property of another; all actions for detaining the personal property, and for converting such personal property to one's own use; all actions for taking away the goods and chattels of another; and all actions upon open accounts, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, — shall be commenced and sued within two years next after the cause of such action or suit, and not after. All actions for injuries done to the person of another, as of assault, battery, wounding, or imprisonment, and all actions for injuries done to the character

or reputation of another, as of libel or slander, shall be commenced and sued within one year next after the cause of such action or suit, and not after; and all actions of debt grounded upon any contract in writing, shall be commenced and sued within four years next after the cause of such action or suit, and not after.

ART. 2378 (2). *Be it further enacted*, that judgment in any court of record within this republic, when execution hath not issued within twelve months after the rendition of the judgment, may be revived by *scire facias* or an action of debt brought thereon within ten years next after the date of such judgment, and not after; or, when execution hath issued and no return is made thereon, the party in whose favor the same was issued [\* clv] shall \* and may move against the sheriff or other officer, or his or their security or securities, for not returning the same, within five years from the day on which it was returnable, and not after: *Provided*, that always, when any person or persons entitled to such judgment, when execution hath issued and no return made (in either case), shall be or were under the age of twenty-one years, was a married woman, a person of unsound mind, imprisoned, or not within the republic, at the time of such judgment being rendered, or such execution being returnable, every such person, his or her heirs, executors, or administrators, shall and may, notwithstanding the said term of five years are or shall have expired, have the benefit of said judgment when no execution hath issued, by reviving the same by *scire facias* or action of debt; and when execution hath issued, and no return made, every such person, his or her heirs, executors, or administrators, may have the benefit of other executions, or may move against the sheriff or other officer, or his or their security or securities for the same, within five years next after such disabilities be removed, and not after.

ART. 2379 (3). *Be it further enacted*, that all actions or suits founded upon any account for goods, wares, or merchandise sold and delivered, or for any articles charged in any store account, shall be commenced and sued within two years next after the cause of such action or suit, and not after; except that, in the case of the death of the creditors or debtors, or removal of the debtor, before the expiration of said term of two years, the further term of one year from the death of such creditor or debtor shall be allowed from the commencement of such action or suit: *Provided*, that, in case of the removal of the debtor out of the county where such debts were created, no Act of limitations shall run unless the person removing shall, ten days previous to his removal, put up a notice in writing at the seat of justice of the county from which he may be about to remove, setting forth his intention to remove.

ART. 2380 (4). *Be it further enacted*, that, to prevent imposition or deception herein, the respective times or dates of the delivery of the several articles charged in any such account, or in any receipt taken for the delivery of them, shall be particularly specified; and, if any merchant or trader shall

wilfully postdate any article or articles in such account, or the receipt taken for the delivery of them, he shall forfeit and pay tenfold the articles so postdated, to be recovered, &c.

ART. 2381 (5). *Be it further enacted*, that, to prevent evasion hereof in regard to the time of the cause of such action or suit, or the time at which such account became due, it is hereby *provided*, that no recovery shall be had for any article charged in such account, which was entered, charged, or delivered for a term of two years or upwards before the commencement of such action or suit, except in the case of the death of the creditor or debtor, before the expiration of one year from the time of such action or suit; and in that case no article shall be allowed which shall appear to have \* been charged or delivered three years or upwards before [\* clvi] the commencement of such action or suit.

ART. 2382 (6). *Be it further enacted*, that, if in any such action or suit judgment be given for the plaintiff, and the same be afterwards reversed by error, or a verdict passed for the plaintiff, and, upon matter alleged in arrest of judgment, the judgment be given against the plaintiff that he take nothing by his plaint, petition, or bill,—in all such cases, the party plaintiff, his heirs, executors, or administrators (as the case shall require), may commence a new action or suit, from time to time, within the year next after such judgment reversed, or such verdict given against the plaintiff, and not after.

ART. 2383 (7). *Be it further enacted*, that, if any suit be brought against any executor or administrator, or other person having charge of the estate of a testator or of an intestate, for the recovery of a debt due upon an open account, it shall be the duty of the court before which such suit is brought, to cause to be expunged from such account every item thereof which shall appear to have become due two years or upwards before the death of the testator or intestate. And, if any person shall wilfully postdate any such account, he shall forfeit tenfold, &c.

ART. 2384 (8). *Be it further enacted*, that each and every claim for money which has been due for more than five years, and less than ten years, an action shall be commenced thereon within one year from the passage of this Act, and not thereafter; on each and every claim for money due for ten and less than fifteen years, action shall be commenced within six months from the passage of this Act; on each and every claim for money due for fifteen years and upwards, action shall be commenced within three months from the passage of this Act, and not thereafter; and in each of the cases mentioned in this section the defendant shall be admitted to plead payment, and, to support the plea, may rely upon the circumstance or the presumption arising from lapse of time.

ART. 2385 (9). *Be it further enacted*, that no writ of error or superseas shall be granted to any judgment in law, nor shall a bill of review

be granted to any decree pronounced in equity, after two years from the time such judgment or decree shall have been made final.

ART. 2386 (10). *Be it further enacted*, that any person absenting himself, beyond sea or elsewhere, for seven years successively, shall be presumed to be dead in any cause wherein his death may come in question, unless proof be made that he was alive within that time: but an estate recovered on such a presumption, if in a subsequent action or suit the person presumed to be dead shall be proved to be living, shall be restored to him who shall have been evicted; and he may, moreover, demand and recover the rents and profits of the estate during such time as he shall be deprived thereof, with lawful interest.

ART. 2387 (11). *Be it further enacted*, that no law of limitations, except in the cases provided for in the eighth section of this Act, shall [\* clvii] \*run against infants, married women, persons imprisoned, or persons of unsound mind, during the existence of their respective disabilities; and, when the law of limitations did not commence to run prior to the existence of these disabilities, such persons shall have the same time allowed them after their removal that is allowed to others by this and other laws of limitations now in force.

ART. 2388 (12). *Be it further enacted*, that, when an action may appear to be barred by a law of limitations, no acknowledgment of the justice of the claim, subsequent to the time it became due, shall be admitted in evidence to take the case out of the operation of the laws; unless such acknowledgment be in writing, and signed by the party to be charged thereby.

ART. 2389 (13). *Be it further enacted*, that no action shall be brought against any emigrant of the republic, to recover a claim which was barred by the statute of limitations of that country or state from which he emigrated; nor shall an action be brought to recover money from an emigrant who was released from its payment by the bankrupt or insolvent laws of the country or state from which he emigrated.

ART. 2390 (14). *Be it further enacted*, that the person who has or shall have right of entry into any real estate, consisting of lands, tenements, or hereditaments, shall make entry therein within ten years next after this right shall have accrued, and on failure shall be for ever barred thereafter; yet, if the person entitled shall have been or shall be under the age of twenty-one years, a *feme covert*, or insane, or if forcible occupation of the premises, or of the country containing them, by a public enemy, prevent entry, the time of such disability shall not be computed as a part of the period of limitation. The death of one dying possessed of such real estate without right shall not be such descent to the heir of the decedent as to bar entry of the person entitled at the time of the descent, unless such decedent shall have had five years' peaceable possession. Peaceable possession,

within the scope of this Act, is such as is continuous and not interrupted by adverse suit to recover the estate.

ART. 2391 (15). *Be it further enacted*, that every suit to be instituted to recover real estate, as against him, her, or them in possession under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards; but in this limitation is not to be computed the duration of disability to sue from minority, coverture, or insanity of him, her, or them having cause of action. By the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and color of title is constituted by a consecutive chain of such transfer down to him, her, or them in possession, without being regular: as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness or honesty; or where the party in possession shall hold the same by a certificate of headright, land \* warrant, or land scrip, with a [\* clviii] chain of transfer down to him, her, or them in possession; and provided this section shall not bar the government.

ART. 2392 (16). *Be it further enacted*, that he, she, or they who shall have had five years' like peaceable possession of real estate, cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be held to have full title, precluding all claims, but shall not bar the government; and saving to the person or persons having superior right and cause of action, the duration of disability arising from nonage, coverture or insanity.

ART. 2393 (17). *Be it further enacted*, that ten years of such peaceable possession and cultivation, use or enjoyment thereof, without any evidence of title, shall give to such naked possessor full property, precursive of all other claims, in and to six hundred and forty acres of land, including his, her, or their improvements: yet the right of the government is not to be barred; and there is saved to the person having the title and cause of action the duration of disability to sue from nonage, coverture, or insanity.

ART. 2394 (18). *Be it further enacted*, that the obligors or any one or more of them whose name or names appear in any statutory bond, concerning which it is or shall be by law provided, that it is to be or shall become a judgment, or have the effect thereof, shall have one year next after the actual or ostensible forfeiture thereof to move the proper court to quash said bond, or otherwise to move for and have an issue or issues, and a jury to try the same or any other matter of fact which, in a regular action on such bond, might properly defeat or modify a recovery thereon against such obligor or obligors.

ART. 2395 (22). *Be it further enacted*, that, if any person against whom there is or shall be cause of action is or shall be without the limits of the

republic at the time of the accruing of such action, or at any time during which the same might have been maintained, then the person entitled to such action shall be at liberty to bring the same against such person or persons, after his or their return to the republic, and the time of such person's absence shall not be accounted or taken as a part of the time limited by this Act.

ART. 2396 (24) *provides*, that the Act of January 20, 1840, shall not be so construed as to recover any claim which had been barred by the laws then in force; and all claims against which the laws then in force had commenced to run shall be barred by the lapse of time which would have barred them had those laws continued in force: *Provided*, the said time be shorter than that by which they would have been barred by the other sections of this Act.

ART. 2397 (25). *Be it further enacted*, that this Act shall not be construed to prejudice the claims of those to real estate that would have been quieted at an earlier time by the twelfth section of "An Act organizing the Inferior Courts," &c., approved December 26, 1836; and the said [\* clix] section \*shall be considered to continue in full force whenever it will quiet titles to land at an earlier period than this Act.

ART. 2398. Act of February 5, 1841 (Supplementary), extends the provisions of the foregoing Act to foreign as well as domestic claims.

ART. 2399. Act of June 28, 1845, *provides*, that suits on foreign judgments, decrees, and adjudications shall be barred in four years after the rendition of the same, unless brought within sixty days from the passage of this Act.

ART. 2400 (5). Act of March 16, 1848. Suits may be commenced in the District Courts, upon all appeal bonds given in the County Courts pertaining to the estates of decedents and wards; and upon all bonds given in the District Courts to remove causes of the estates of decedents and wards to the District Courts, within four years next after the right of action shall have accrued on said bonds, and not afterwards; saving to persons *non compos mentis*, infants, and *femes covert*, two years after the respective disabilities shall be removed.

ART. 2401 (114). Act of March 20, 1848. All suits upon the bond of any executor or administrator shall be commenced and prosecuted within four years next after the death, resignation, removal, or discharge of such executor or administrator, and not thereafter: *Provided*, however, that infants, *femes covert*, and persons *non compos mentis*, shall have at least two years within which to institute such suits after the removal of their respective disabilities.

ART. 2402 (40). Act of the same date makes similar provisions with reference to guardians' bonds.



(From the Code of Iowa, tit. XIX. Ch. 99. 1851.)

1659. THE following actions may be brought within the times herein limited respectively after their causes accrue, and not afterwards, except when otherwise specially declared; that is to say: —

*First.* Actions of slander, libels, malicious prosecution, injuries to the person, or for a statute penalty within two years.

*Second.* Those against a sheriff or other public officer growing out of a liability incurred by the doing of an act in an official capacity, or by the omission of an official duty, including the non-payment of money collected on execution within three years.

*Third.* Those founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud in cases heretofore \*solely cognizable in a court of chancery, and all other actions not [\* clx] otherwise provided for, in this respect, within five years.

*Fourth.* Those founded on written contracts, or judgments of any court (except those courts provided for in the next section), and those brought for the recovery of real property, within ten years.

*Fifth.* Those founded on a judgment of a court of record, whether of this or of any other of the United States, or of the federal courts of the United States, within twenty years.

1660. In actions for relief on the ground of fraud, as above contemplated, the cause of action will not be deemed to have accrued until the discovery of the fraud by the party aggrieved.

1661. In actions founded upon contract, the above limitations shall not apply if, from the answer of the defendant or from his testimony as a witness, it appears affirmatively that the cause of action still justly subsists. But the answer of one of several defendants shall not prejudice the interests of others in this respect.

1662. Where there is a continuous open current account, the cause of action shall be deemed to have accrued on the date of the last item therein, as proved on the trial.

1663. The delivery of the original notice to the sheriff of the proper county with intent that it be served immediately (which intent shall be presumed unless the contrary appears), or the actual service of that notice by another person, is a commencement of the action.

1664. The time during which a defendant is a non-resident of the State shall not be included in computing any of the periods of limitation above prescribed.

1665. But, when a cause of action has been fully barred by the laws of any country where the defendant has previously resided, such bar shall be



the same defence here as though it had arisen under the provisions of this chapter.

1666. The above limitation of actions for the recovery of real property shall not apply to minors, so far as to prevent them from having at least one year after attaining their majority within which to commence such actions.

1667. If the person entitled to a cause of action die within one year next previous to the expiration of the limitation above provided for, the limitation above mentioned shall not apply until one year after such death.

1668. If, after the commencement of an action, the plaintiff fail therein for any cause except negligence in its prosecution, and a new suit be brought within six months thereafter, the second suit shall, for the purposes herein contemplated, be deemed a continuation of the first.

1669. The above limitations and provisions shall not apply to evidences of debt intended to circulate as money, but shall in other respects be applicable to all actions brought by or against all bodies corporate and politic, except when otherwise expressly declared.

[\* clxi] \* 1670. Causes of action founded on contract are revived by an admission that the debt is unpaid, as well as by a new promise to pay the same.

1671. The provisions of this chapter are intended to apply to causes of action which have already accrued and are not yet barred, subject to the regulations contained in the following two sections.

1672. The times hereinafter allowed for commencing actions in such cases shall not be less than one-half the periods of limitation herein respectively prescribed, except as provided in the next section.

1673. But when the period of limitation, heretofore fixed by statute, is not enlarged by the provisions of the first section of this chapter, the time allowed for the commencement of a suit shall in no case be greater than that fixed by the law heretofore in force as applied to those cases.

1674. The time of limitation in relation to actions for the recovery of real estate, as prescribed in this chapter, shall not commence to run in favor of a settler on any public lands until such lands have been sold by the State.

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## CALIFORNIA.

(Statutes of California. First Session.)

### CHAPTER I.

SECTION 1. Civil actions can only be commenced within the periods prescribed in this Act, after the cause of action shall have accrued, except when a different limitation is prescribed by statute.

SECT. 2. When the cause of action has already accrued, the party entitled, and those claiming under him, shall have, after the passage of this Act, the whole period herein prescribed in which to commence an action.

## CHAPTER II.

SECT. 3. The people of this State will not sue any person for or in respect to any real property, or the issues or profits thereof, by reason of the right or title of the people to the same : unless, first, such right or title shall have accrued within ten years before any action or other proceeding for the same shall be commenced ; or unless, second, the people, or those from whom they claim, shall have received the rents or profits of such real property, or of some part thereof, within the space of ten years.

SECT. 4. No action shall be brought for or in respect to real property \* by any person claiming by virtue of letters-patent or [\* clxii] grants from the State, unless the same might have been commenced by the people as herein specified, in case such patent or grant had not been issued or made.

SECT. 5. When letters-patent or grants of real property shall have been issued or made by the people of this State, and the same shall be declared void by the determination of a competent court, rendered upon an allegation of a fraudulent suggestion, or concealment, or forfeiture, or mistake, or ignorance of a material fact, or wrongful detaining, or defective title,—in such case an action for the recovery of the premises so conveyed may be brought either by the people of the State or by any subsequent patentee or grantee of the same premises, his heirs or assigns, within five years after such determination was made, but not after that period.

SECT. 6. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it shall appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within five years before the commencement of the action.

SECT. 7. No cause of action, or defence to an action founded upon the title to real property, or to rents or service out of the same, shall be effectual unless it appear that the person prosecuting the action or making the defence, or under whose title the action is prosecuted, or the defence is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within five years before the commencement of the Act in respect to which such action is prosecuted or defence made.

SECT. 8. No entry upon real estate shall be deemed sufficient or valid as a claim, unless an action be commenced thereon within one year after making such entry, and within five years from the time when the right to make such entry descended or accrued.

SECT. 9. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the time prescribed by law ; and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for five years before the commencement of such action.

SECT. 10. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim for five years, — the premises so included shall be deemed to [\* clxiii] have been held \*adversely ; except that, when the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of the same tract.

SECT. 11. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or a judgment or decree, land shall be deemed to have been possessed and occupied in the following cases: 1st. When it has been usually cultivated and improved. 2d. When it has been protected by a substantial inclosure. 3d. When (although not inclosed) it has been used for the supply of fuel or of fencing timber for the purposes of husbandry, or for the use of pasturage, or for the ordinary use of the occupant. 4th. When a known lot or single farm has been partly improved, the portion of such lot or farm that may have been left not cleared, or not inclosed according to the usual custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

SECT. 12. When it shall appear that there has been an actual continual occupation of premises, under a claim of title exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

SECT. 13. For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment, or decree, land shall be deemed to have been possessed and occupied in the following cases only: 1st. When it has been protected by a substantial inclosure. 2d. When it has been usually cultivated and improved.

SECT. 14. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of five years from the ter-

mination of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

SECT. 15. The right of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

SECT. 16. If a person entitled to commence any action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rents or services out of the same, be at the time such title shall first descend or accrue, either: 1. Within the age of twenty-five years; or, 2. Insane; or, 3. Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence, for a term less than for life; or, 4. A married woman, — the time during which such disability shall continue shall not be deemed any portion of the time in this Act limited for the \* commencement of such action, or the making [\* clxiv] such entry or defence: but such action may be commenced, or entry or defence made, within the period of five years after such disability shall cease, or after the death of the person entitled, who shall die under such disability; but such action shall not be commenced, or entry or defence made, after that period.

### CHAPTER III.

SECT. 17. Actions other than those for the recovery of real property can only be commenced as follows: Within five years: An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States. Within four years: An action upon any contract, obligation, or liability founded upon an instrument of writing except those mentioned in the preceding section. Within three years: 1. An action for a liability created by statute, other than a penalty or forfeiture. 2. An action for trespass on real property. 3. An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. 4. An action for relief on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud. Within two years: An action upon a contract, obligation, or liability, not founded upon an instrument in writing; except an action on an open account for goods, wares, and merchandise, and an action for any article charged in a store account. 2. An action against a sheriff, coroner, or constable, upon the liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official duty, including the non-payment of money collected on an execution. But this

section shall not apply to an action for an escape. Within one year: An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation. 2. An action for libel, slander, assault, battery, or false imprisonment. 3. An action upon a statute for a forfeiture or penalty to the people of the State. 4. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process. 5. An action on an open account for goods, wares, and merchandise sold and delivered. 6. An action for any article charged in a store account.

SECT. 18. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side.

SECT. 19. An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.

[\* clxv] \* SECT. 20. The limitations prescribed in this chapter shall apply to actions brought in the name of the State, or for the benefit of the State, in the same manner as to actions brought by private persons.

#### CHAPTER IV.

SECT. 21. An action shall be deemed to be commenced, within the meaning of this Act, when the complaint has been filed in the proper court.

SECT. 22. If, when the cause of action shall accrue against a person, he is out of the State, the action may be commenced within the time herein limited after his return to the State; and if, after the cause of action shall have accrued, he depart the State, the time of his absence shall not be part of the time limited for the commencement of the action.

SECT. 23. If a person entitled to bring any action mentioned in the last preceding chapter, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, either: 1st. Within the age of twenty-one years; or, 2d. Insane; or, 3d. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or, 4th. A married woman, — the time of such disability shall not be a part of the time limited for the commencement of the action.

SECT. 24. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time, and within six months from his death. If a

person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

SECT. 25. When a person shall be an alien, subject, or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.

SECT. 26. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

SECT. 27. When the commencement of an action shall be stayed by an injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

\* SECT. 28. No person shall avail himself of a disability, unless [\* clxvi] it existed when his right of action accrued.

SECT. 29. When two or more disabilities coexist at the time the right of action accrues, the limitation shall not attach until they all be removed.

SECT. 30. The preceding sections of this Act shall not affect actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by laws; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or the forfeiture attached, or the liability was created.

SECT. 31. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of the statute, unless the same be contained in some writing signed by the party to be charged thereby.

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## GENERAL LAWS OF OREGON.

### CHAPTER I. TITLE 11.

SECTION 3. Actions at law shall only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; except where, in special cases, a different limitation is prescribed by statute. But the objection that the action was not commenced within the time limited shall only be taken by answer, except as otherwise provided in section 66.

SECT. 4. The periods prescribed in the preceding section for the commencement of actions shall be as follows:—

Within twenty years : —

Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within twenty years before the commencement of the action.

SECT. 5. Within ten years : —

*First.* An action upon a judgment or decree of any court of the United States, or of any State or Territory within the United States.

*Second.* An action upon a sealed instrument.

SECT. 6. Within six years : —

*First.* An action upon a contract or liability, express or implied, excepting those mentioned in Section 5.

*Second.* An action upon a liability created by statute, other than a penalty or forfeiture.

*Third.* An action for waste or trespass upon real property.

*Fourth.* An action for taking, determining, or injuring personal property, including an action for the specific recovery thereof.

*Fifth.* An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

SECT. 7. Within three years : —

*First.* An action against a sheriff, coroner, or constable, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office; or by the omission of an official duty, including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.

*Second.* An action upon a statute for penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the State, except when the statute imposing it prescribes a different limitation.

SECT. 8. Within two years : —

*First.* An action for libel, slander, assault, battery, or false imprisonment.

*Second.* An action upon a statute for a forfeiture or penalty to the State.

SECT. 9. Within one year : —

An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

SECT. 10. An action upon a statute for a penalty given in the whole or in part to the person who will prosecute for the same, shall be commenced within one year after the commission of the offence; and, if the action be not commenced within one year by a private party, it may be commenced within two years thereafter, in behalf of the State, by the district attorney of the county when the offence was committed or is triable.

SECT. 11. An action for any cause not hereinbefore provided for shall



be commenced within ten years after the cause of action shall have accrued.

SECT. 12. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side ; but whenever a period of more than one year shall elapse between any of a series of items or demands, they are not to be deemed such an account.

SECT. 13. The limitations prescribed in this title shall apply to actions brought in the name of the State, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties.

SECT. 14. An action shall be deemed commenced, as to each defendant, when the complaint is filed and the summons served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him.

SECT. 15. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the complaint is filed, and the summons delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants or one of them usually or last resided ; or, if a corporation be defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business. But such attempt shall be followed by the first publication of the summons, or the service thereof, within sixty days.

SECT. 16. If, when the cause of action shall accrue against any person who shall be out of the State or concealed therein, such action may be commenced within the terms herein respectively limited after the return of such person into the State, or the time of his concealment ; and if, after such cause of action shall have accrued, such person shall depart from and reside out of this State, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limited for the commencement of such action.

SECT. 17. If a person entitled to bring an action mentioned in this title, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrues, either,

*First.* Within the age of twenty-one years ; or,

*Second.* Insane ; or,

*Third.* Imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life ; or,

*Fourth.* A married woman, —

The time of such disability shall not be a part of the time limited for the

commencement of the action : but the period within which the action shall be brought, except the actions mentioned in section four, shall not be extended more than five years by any such disability, except infancy ; nor shall it be extended in any case longer than one year after the disability ceases.

SECT. 18. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his personal representatives after the expiration of the time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representatives after the expiration of that time, and within six months after the issuing of letters testamentary or of administration.

SECT. 19. When a person shall be an alien, subject, or citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action.

SECT. 20. When the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action.

SECT. 21. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed on appeal, the plaintiff, or, if he die and the cause of action survives, his heirs or personal representatives, may commence a new action within one year after the reversal.

SECT. 22. No person shall avail himself of a disability, unless it existed when his right of action accrued.

SECT. 23. When two or more disabilities shall coexist at the time the right of action accrues, the limitation shall not attach until they all be removed.

SECT. 24. No acknowledgment or promise shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this title, unless the same is contained in some writing signed by the party to be charged thereby ; but this section shall not alter the effect of any payment of principal or interest.

SECT. 25. Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

SECT. 26. When the cause of action has arisen in another State, Territory, or country, between non-residents of this State, and by the laws of the

State, Territory, or country where the cause of action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this State.

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REVISED STATUTES OF MINNESOTA.

CHAPTER LXX.

SECTION 3. Actions can only be commenced within the periods prescribed in this chapter, after the cause of action shall have accrued, except where in special cases a different limitation is prescribed by statute.

SECT. 4. No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within twenty years before the commencement of the suit. The periods prescribed in the preceding section for the commencement of actions are as follows : —

SECT. 5. Within ten years : —

An action upon a judgment or decree of a court of the United States, or of any State or Territory of the United States.

SECT. 6. Within six years : —

*First.* An action upon a contract or other obligation, express or implied, excepting those mentioned in the last preceding section.

*Second.* An action upon a liability created by statutes, other than those upon a penalty or forfeiture.

*Third.* An action for trespass upon real property.

*Fourth.* An action for taking, detaining, and injuring personal property, including actions for the specific recovery thereof.

*Fifth.* An action for criminal conversation, or for any other injury to the person or rights of another, not arising on obligation, and not hereinafter enumerated.

*Sixth.* An action for relief, on the ground of fraud ; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

SECT. 7. Within three years : —

*First.* An action against a sheriff, coroner, or constable, upon the liability by the doing of an act in his official capacity, and in virtue of his office, or by an omission of an official duty, including the failure to pay money collected upon an execution ; but this section does not apply to an action for an escape.

*Second.* An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, except as otherwise provided by law.

SECT. 8. Within two years:—

*First.* An action for libel, slander, assault, battery, or false imprisonment.

*Second.* An action upon a statute for a forfeiture or penalty to the Territory.

SECT. 9. Within one year:—

An action against a sheriff or other officer, for the escape of a person arrested or imprisoned by a civil process.

SECT. 10. In an action brought to recover a balance due upon a mutual open and current account, when there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account, claimed or proved to be chargeable on the adverse side.

SECT. 11. An action upon a statute for a penalty given in the whole or in part, to the person who prosecutes for the same, must be commenced within one year after the commission of the offence; and, if the action be not commenced within one year by a private party, it may be commenced within two years thereafter in behalf of the United States, by the Attorney-General, or the district attorney of the county where the offence was committed.

SECT. 12. An action for relief, not being before provided for, must be commenced within ten years after the cause of action shall have accrued.

SECT. 13. The limitations prescribed in this chapter apply to actions brought in the name of the United States, in the same manner as to actions by private parties.

SECT. 14. An action is commenced as to each defendant when the summons is served on him, or on a defendant who is a joint contractor, or otherwise united in interest with him.

SECT. 15. An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this chapter, when the summons is delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided; or, if a corporation be a defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business; but such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days.

SECT. 16. If, when the cause of action accrue against a person, he be out of the Territory, the action may be commenced within the term herein limited after his return to the Territory; and if, after the cause of action accrues, he depart from the Territory, the time of his absence is not part of the limited time for the commencement of the action.

SECT. 17. If a person, entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, either,

*First.* Within the age of twenty-one years; or,

*Second.* Insane; or,

*Third.* Imprisoned on a criminal charge, or in execution under the sentence of a criminal, for a time less than his natural life; or,

*Fourth.* A married woman,—

The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended more than five years by any such disability, except infancy, nor can it be so extended in any case longer than one year after the disability ceases.

SECT. 18. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration, and within one year after the issuing of letters testamentary or of administration.

SECT. 19. When a person is an alien, subject, or citizen of a country at war with the United States, the time of the continuance of the war is not part of the period limited for the commencement of the action.

SECT. 20. When the commencement of an action is stayed by injunction, or a statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

SECT. 21. No person can avail himself of a disability, unless it existed at the time his right of action accrued.

SECT. 22. When two or more disabilities coexist at the time the right of action accrues, the limitation does not attach until they are all removed.

SECT. 23. No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this chapter, unless the same is contained in some writing, signed by the party to be charged thereby.

SECT. 24. Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, bond, promissory note, or other evidence of indebtedness, if such payment be made after the same becomes due, the limitation shall commence from the time the last payment was made.

SECT. 25. If any action be commenced within the time prescribed there-

for, and judgment be given therein for the plaintiff, and the same be arrested or reversed on error or appeal, the plaintiff may commence a new action within one year after such reversal or arrest.

SECT. 26. This chapter does not extend to actions already commenced; but the statutes now in force are applicable to such cases, according to the subject of the action, and without regard to the form.

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## GENERAL LAWS OF KANSAS.

### CHAPTER XXVI. TITLE 2.

#### CHAPTER 1. — *Actions in General.*

SECTION 13. This title shall not apply to actions already commenced; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.

SECT. 14. All Acts and parts of Acts inconsistent with the provisions of this Act are repealed.

SECT. 15. Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued; but where, in special cases, a different limitation is prescribed by statute, the action must be commenced accordingly.

#### CHAPTER 2. — *Actions for the Recovery of Real Property.*

SECT. 16. An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within twenty-one years after the cause of such action shall have accrued.

SECT. 17. If a person entitled to commence any action for the recovery of the title or possession of any lands, tenements, or hereditaments, be, at the time his right or title shall first descend or accrue, within the age of twenty-one years, a married woman, insane, or imprisoned, every such person may, after the expiration of twenty-one years from the time his right or title descended or accrued, bring such action within ten years after such disability is removed, and at no time thereafter.

SECT. 18. An action for the forcible entry and detention, or forcible detention only, of real property, can only be brought within five years after the cause of such action shall have accrued.

#### CHAPTER 3. — *Actions other than for the Recovery of Real Property.*

SECT. 19. Civil actions other than for the recovery of real property can only be brought within the following periods: —

SECT. 20. Within three years: An action upon a specialty, or any agreement, contract, or promise in writing.

SECT. 21. Within three years: An action upon contract, not in writing, express or implied; an action upon a liability created by statute, other than a forfeiture or penalty.

SECT. 22. Within two years: An action for trespass upon real property; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property; an action for injury to the rights of the plaintiff, not arising on contracts, and not hereinafter enumerated; an action for relief on the ground of fraud,—the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.

SECT. 23. Within one year: An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment, an action upon a statute for a penalty or forfeiture; but, when the statute giving such action presents a different limitation, the action may be brought within the period so limited.

SECT. 24. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, arrest, or in any case whatever required by statute, can only be brought within ten years after the cause of action shall have accrued; but this section shall be subject to the qualification in section 15.

SECT. 25. An action for relief, not hereinbefore provided for, can only be brought within ten years after the cause of action shall have accrued.

SECT. 26. If a person entitled to bring any action mentioned in this chapter, except for a penalty or a forfeiture, be, at the time the cause of action accrued, within the age of twenty-one years, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this chapter, after such disability shall be removed.

#### CHAPTER 4. — *General Provisions.*

SECT. 27. An action shall be deemed commenced within the meaning of this title, as to each defendant, at the date of the summons which is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him; when service by publication is proper, the action shall be deemed commenced at the date of the first publication, which publication must be regularly made. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the party faithfully, properly, and diligently endeavors to procure a service; but such attempt must be followed by service within sixty days.



SECT. 28. If, when a cause of action accrues against a person, he be out of the Territory, or has absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the Territory, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the Territory, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

SECT. 29. Where the cause of action has arisen in another State or country, between non-residents of this Territory, and, by the laws of the State or county where the cause of action arose an action cannot be maintained thereon by reason of lapse of time, no action can be maintained thereon in this Territory.

SECT. 30. If any action be commenced within due time, and a judgment thereon for the plaintiff be reversed, or, if the plaintiff fail in such action, otherwise than upon the merits, and the time limited for the same shall have expired, the plaintiff, or, if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure.

SECT. 31. In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made, an action may be brought on such case within the period prescribed for the same, after such payment, acknowledgment, or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby.

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#### LORD TENTERDEN'S ACT.

(9 Geo. IV. c. 14.)

*"An Act for rendering a written Memorandum necessary to the Validity of certain Promises and Engagements."*

SECTION 1. Whereas, by an Act passed in England in the twenty-first year of the reign of King James the First, it was, among other things, enacted, that all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suit, and not after; and whereas a similar enactment is contained in an Act passed in Ireland in the tenth year of the reign of King

Charles the First; and whereas various questions have arisen in actions founded on simple contract, as to the proof and effect of acknowledgments and promises offered in evidence for the purpose of taking cases out of the operation of the said enactments, and it is expedient to prevent such questions, and to make a provision for giving effect to the said enactments and to the intention thereof: Be it therefore enacted, by the king's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal and commons in this present parliament assembled, and by the authority of the same, that in actions of debt, or upon the case, grounded \* upon any simple contract, no acknowledgment [\* clxvii] or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: *Provided, always*, that nothing herein contained shall alter or take away, or lessen the effect of, any payment of any principal or interest made by any person whatsoever: *Provided, also*, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts, or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff.

SECT. 2. If any defendant or defendants, in any action on any simple contract, shall plead any matter in abatement to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said recited Acts or of this Act, or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same.

SECT. 3. No indorsement or memorandum of any payment written or made after the time appointed for this Act to take effect upon any promissory note, bill of exchange, or other writing, by or on the behalf of the

party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

SECT. 4. That the said recited Act, and this Act, shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

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ACT OF VIRGINIA REQUIRING NEW PROMISES AND ACKNOWLEDGMENTS  
TO BE IN WRITING.

*An Act amending the Statute of Limitations. (Passed April 3, 1838.)*

1. *Be it enacted, by the General Assembly, that, in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise made hereafter by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the Act entitled "An Act for limitation of actions, for preventing frivolous and vexatious suits, concerning jeofails and proceedings in civil cases," passed February 25, 1819, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said Act, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: *Provided*, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear, at the trial or otherwise, that the plaintiff, though barred by the before recited Act, or this Act, as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff: *And provided, also*, that every such written promise or acknowledgment shall be held and taken to be a drawing down of the original debt or contract to the date of the said promise or acknowledgment.*

## NEVADA.

(Compiled Laws of Nevada. Ch. 50.)

*Approved Nov. 21, 1861.*

SECTION 1. Civil actions can only be commenced within the periods prescribed by this Act, after the cause of action shall have accrued, except when a different limitation is prescribed by statute.

SECT. 2. When the cause of action shall have already accrued, the party entitled, and those claiming under him, shall have, after the passage of this Act, the whole period herein prescribed in which to commence an action.

SECT. 3. The State of Nevada will not sue any person for, or in respect to, any real property, or the issues or profits thereof, by reason of the right or title of the State to the same, unless,

*First.* Such right or title shall have accrued within ten years before any action or other proceeding for the same; or, unless,

*Second.* The State, or those from whom it claims, shall have received the rents and profits of such real property, or of some part thereof, within the space of ten years. [As amended, Stat. 1867, p. 85.]

SECT. 4. No action for the recovery of mining claims, or for the recovery of possession thereof, shall be maintained, unless it appear that the plaintiff, or those through or from whom he claims, were seised or possessed of such mining claims, or were the owners thereof, according to the laws and customs of the district embracing the same, within ten years before the commencement of such action. Occupation and adverse possession of a mining claim shall consist in holding and working the same in the usual and customary mode of holding and working similar claims in the vicinity thereof. All the provisions of this Act, which apply to other real estate, so far as applicable, shall be deemed to include and apply to mining claims: *Provided*, that in such application "two years" shall be held to be the period intended wherever the term of "five years" is used; *And provided, further*, that, when the terms "legal title" or "title" are used, they shall be held to include title acquired by location or occupation, according to the usages, laws, and customs of the district embracing the claim. [As amended, Stat. 1867, p. 85.]

SECT. 5. No cause of action, or defence to an action, founded upon the title to real property, or to rents, or to services out of the same, shall be effectual, unless it appear that the person prosecuting the action, or making the defence, or under whose title the action is prosecuted or the defence is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within five years before the committing the act in respect to which such action is prosecuted or defence made. [As amended, Stat. 1867, p. 85.]

SECT. 6. No peaceable entry upon real estate shall be deemed sufficient and valid as a claim, unless an action be commenced by the plaintiff for possession within one year from the making of such entry, or within five years from the time when the right to bring such action accrued. [As amended, Stat. 1867, p. 86.]

SECT. 7. In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the premises shall be presumed to have been possessed thereof within the term prescribed by law; and the occupation of such premises by any other person shall be deemed to have been under, and in subordination to, the legal title, unless it appear that such premises have been held and possessed adversely to such legal title for five years before the commencement of such action.

SECT. 8. Whenever it shall appear that the occupant, or those under whom he claims, entered into the possession of premises under claim of title, exclusive of any other right, founding such claim upon a written instrument, as being a conveyance of the premises in question, or upon the decree or judgment of a competent court, and that there has been a continued occupation and possession of the premises included in such instrument, decree, or judgment, or of some part of such premises, under such claim, for five years, the premises so included shall be deemed to have been held adversely, except that, where the premises so included consist of a tract divided into lots, the possession of one lot shall not be deemed a possession of any other lot of this same tract.

SECT. 9. For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument, or judgment or decree, land shall be deemed to have been possessed and occupied in the following cases:—

*First.* When it has been usually cultivated and improved.

*Second.* When it has been protected by a substantial enclosure.

*Third,* When (although not enclosed) it has been used for the supply of fuel, or of fencing timber, for the purposes of husbandry; or for the use of pasturage, or for the ordinary uses of the occupant.

*Fourth.* Where a known lot, or single farm not exceeding three hundred and twenty acres in extent, has been partly improved, the portion of such farm or lot that may have been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

SECT. 10. When it shall appear that there has been an actual continued occupation of premises under a claim of title, exclusive of any other right, but not founded upon a written instrument, or a judgment or decree, the premises so actually occupied, and no other, shall be deemed to have been held adversely.

SECT. 11. For the purpose of constituting an adverse possession, by a person claiming title, not founded upon a written instrument, judgment, or decree, land shall be deemed to have been possessed and occupied in the following cases only :—

*First.* When it has been protected by a substantial enclosure.

*Second.* When it has been usually cultivated or improved.

SECT. 12. Whenever the relation of landlord and tenant shall have existed between any persons, the possession of the tenant shall be deemed the possession of the landlord, until the expiration of five years from the expiration of the tenancy, or, where there has been no written lease, until the expiration of five years from the time of the last payment of rent, notwithstanding that such tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited.

SECT. 13. The rights of a person to the possession of any real property shall not be impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

SECT. 14. If a person entitled to commence . . . any action for the recovery of real property, or to make an entry or defence founded on the title to real property, or to rent or services out of the same, be, at the time such title shall first descend or accrue, either, —

*First.* Within the age of twenty-one years ; or,

*Second.* Insane ; or,

*Third.* Imprisoned on a criminal charge, or in execution upon conviction of a criminal offence for a term less than for life ; or,

*Fourth.* A married woman, —

SECT. 15. The time during which such disability shall continue shall not be deemed any portion of the time in this Act limited for the commencement of such action, or the making of such entry or defence : but such action may be commenced, or entry or defence made, within the period of five years after such disability shall cease, or after the death of the person entitled who shall die under such disability ; but such action shall not be commenced, or entry or defence made, after that period.

SECT. 16. Actions other than those for the recovery of real property can only be commenced as follows : —

Within five years : —

An action upon a judgment or decree of any court of the United States, or of any State or territory within the United States.

Within four years : —

An action upon any contract, obligation, or liability, founded upon an instrument in writing, except those mentioned in the preceding section.

Within three years : —

*First.* An action upon a liability created by statute other than a penalty or forfeiture.

*Second.* An action for trespass upon real property.

*Third.* An action for taking, detaining, or injuring any goods or chattels, including actions for the specific securing of personal property.

*Fourth.* An action for relief on the ground of fraud; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud.

Within two years:—

*First.* An action upon a contract, obligation, or liability not founded upon an instrument of writing.

*Second.* An action against a sheriff, coroner, or constable, upon the liability incurred by the doing an act in his official capacity, and in virtue of his office; or by the omission of an official duty, including the non-payment of money collected upon an execution.

*Third.* An action upon a statute for a penalty or forfeiture when the action is given to an individual, or an individual and the State, except where the statute imposing it prescribes a different limitation.

*Fourth.* An action for libel, slander, assault, battery, or false imprisonment.

*Fifth.* An action upon a statute for a forfeiture or penalty to the State.

*Sixth.* An action against a sheriff or other officer for the escape of a prisoner arrested, or imprisoned on civil process.

*Seventh.* An action in an open court for goods, wares, and merchandise sold and delivered.

*Eighth.* An action for any article charged in a store account. [As amended, Stat. 1867, p. 86.]

SECT. 17. In an action brought to recover a balance due upon a mutual, open, and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item procured in the account on either side.

SECT. 18. An action for relief, not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued.

SECT. 19. The limitations prescribed in this Act shall apply to actions brought in the name of the State or for the benefit of the State, in the same manner as to actions by private parties. [As amended, Stat. 1867, p. 86.]

SECT. 20. An action shall be deemed to be commenced, within the meaning of this Act, when the complaint has been filed in the proper court, and summons issued and placed in the hands of the sheriff of the county, or other person authorized to serve the same.

SECT. 21. If, when the cause of action shall accrue against a person, he be out of the State, the action may be commenced within the time herein



limited after his return to the State ; and if, after the cause of action shall have accrued, he depart the State, the time of his absence shall not be part of the time prescribed for the commencement of the action. [As amended, Stat. 1867, p. 86.]

SECT. 22. If a person entitled to bring an action, other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, either,

*First.* Within the age of twenty-one years ; or,

*Second.* Insane ; or,

*Third.* Imprisoned on a criminal charge, or in execution under sentence of a criminal court, for a term less than his natural life ; or,

*Fourth.* A married woman, —

The time of such disability shall not be a part of the time limited for the commencement of the action.

SECT. 23. If the person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his executors or administrators after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.

SECT. 24. When a person shall be an alien, subject, or citizen of a country at war with the United States, the time of the continuance of the war shall not be a part of the period limited for the commencement of the action : *Provided, however,* that nothing in this section shall be so construed as to consider an action a process of any State engaged in rebellion against the United States government as an alien.

SECT. 25. If an action shall be commenced within the time prescribed therefor, and a judgment thereon be reversed on appeal, the plaintiff, or, if he die and the cause of action survive, his heirs or representatives, may commence a new action within one year after the reversal.

SECT. 26. When the commencement of an action shall be stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition shall not be part of the time limited for the commencement of the action.

SECT. 27. No person shall avail himself of a disability, unless it existed when the cause of action accrued.

SECT. 28. When two or more disabilities coexist at the time the right of action accrues, the limitation shall not attach until they are all reversed.

SECT. 29. The preceding sections of this Act shall not affect actions

against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law ; but such actions must be brought within three years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached or the liability was created.

SECT. 30. No acknowledgment or provision shall be sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of this statute, unless the same be contained in some writing, signed by the party to be charged thereby.

SECT. 31. [Stat. of 1861, repealed by Stat. of 1867, p. 87.]

SECT. 32. An action upon a judgment, contract, obligation, or liability for the payment of money or damages obtained, made, executed, or incurred out of the State, can only be commenced as follows : —

*First.* Within one year, when, prior to the passing of this Act, more than two or less than five years have elapsed since the cause of action accrued.

*Second.* Within six months, when, prior to the passing of this Act, more than five years have elapsed since the cause of action accrued.

*Third.* Within two years, in all other cases after the cause of action accrued. A right of action shall be denied on a judgment at the time of its rendition. [As amended, Stat. 1867, p. 87.]

SECT. 33. When the cause of action has arisen in any other State or Territory of the United States, or in a foreign country, and by the laws thereof an action there cannot be maintained against a person by reason of the lapse of time, no action thereon shall be maintained against him in this State. [As amended, Stat. 1867, p. 87.]

#### *Act of 1869.*

1049. SECTION 1. No action for the recovery of real property, or for the recovery of the possession thereof, other than military claims, shall be maintained, unless it appear that the plaintiff, his ancestors, predecessors, or grantor was seised or possessed of the premises in question within five years before the commencement thereof.

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#### NEBRASKA.

##### *General Statutes. Ch. 55, Tit. 11.*

SECTION 5. Civil actions can only be commenced within the time prescribed in this title, after the cause of action shall have accrued.

SECT. 6. An action for the recovery of the title or possession of lands, tenements, or hereditaments, can only be brought within ten years after the cause of such action shall have accrued. This section shall be construed to apply also to mortgages.

SECT. 7. Any person entitled to commence any action for the recovery of the title or possession of any lands, tenements, or hereditaments, who may be under any legal disability when the cause of action accrues, may bring such action within ten years after the disability is removed, and at no time thereafter.

SECT. 8. An action for the forcible entry and detainer, or forcible detainer only, of real property, can only be brought within one year after the cause of such action shall have accrued.

SECT. 9. Civil actions, other than for the recovery of real property, can only be brought within the following periods after the cause of action shall have accrued : —

SECT. 10. Within four years, an action upon a specialty, or upon any agreement, contract, or pension, in writing, or foreign judgment.

SECT. 11. Within four years, an action upon a contract not in writing, expressed and implied ; an action upon a liability enacted by statute, other than a forfeiture or penalty.

SECT. 12. Within four years, an action for trespass upon real property ; an action for taking, detaining, or injuring personal property, including actions for the specific recovery of personal property ; an action for an injury to the rights of the plaintiff, not arising on contract, and not hereinafter enumerated ; an action for relief on the ground of fraud : but the cause of action in such cases shall not be deemed to have accrued until the discovery of the fraud.

SECT. 13. Within one year, an action for libel, slander, assault and battery, malicious prosecution, or false imprisonment ; an action upon a statute for a penalty or forfeiture, but where the statute giving such action prescribes a different limitation, the action may be brought within the period so limited.

SECT. 14. An action upon the official bond or undertaking of an executor, administrator, guardian, sheriff, or any other officer, or upon the bond or undertaking given in attachment, injunction, or in any case whatever required by statute, can only be brought within ten years.

SECT. 15. Actions brought for damages growing out of the failure or want of consideration of contracts, express or implied, or for the recovery of money paid upon contracts, express or implied, the consideration of which has wholly or in part failed, shall be brought within four years.

SECT. 16. An action for relief not hereinbefore provided for can only be brought within four years after the cause of action shall have accrued.

SECT. 17. If a person entitled to bring any action mentioned in this title, except for a penalty or forfeiture, be at the time the cause of action accrued within the age of twenty-one years, a married woman, insane, or imprisoned, every such person shall be entitled to bring such action within the respective times limited by this title after such disability shall be re-

moved. The absence from the State, death, or other disability of a non-resident, save the cases mentioned in this section, shall not operate to extend the period within which actions *in rem* shall be commenced by and against such non-resident, or his representatives.

SECT. 18. All actions, or causes of action, which are or have been barred by the laws of this State, or any State or Territory of the United States, shall be deemed barred by the laws of this State.

SECT. 19. An action shall be deemed commenced, within the meaning of this title, as to the defendant, at the date of the summons which is served on him; when served by publication in papers, the action shall be deemed commenced at the date of the fourth publication, which publication shall be regularly made.

SECT. 20. If, when a cause of action accrues against a person, he be out of the State, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the State, or while he is absconded or concealed; and if, after the cause of action accrues, he depart from the State, or abscond or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

SECT. 21. When a cause of action has been fully barred by the laws of any State or country where the defendant has previously resided, such bar shall be the same defence in this State as though it had arisen under the provisions of this title.

SECT. 22. If any cause founded on contract, where any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt, or claim, or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment, or promise.

# INDEX.

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[The figures refer to sections.]

---

**ACCOUNT.** See **MERCHANTS' ACCOUNTS — MUTUAL ACCOUNTS.**

action of, and the limitation of it, 69.

exception of "merchants' accounts" confined to the action of account, 153.

**ACKNOWLEDGMENT OF DEBTS.** See **NEW PROMISES AND ACKNOWLEDGMENTS.**

**ACTIONS.** See **REAL ACTIONS.**

what actions *ex contractu* are within the statute, 68–78.

(And see **ACCOUNT — ASSUMPSIT — COVENANT — DEBT — TRESPASS — TROVER.**)

as to the postponement of a right of action on a contract, 121, 122.

**ADMIRALTY,**

courts of, how governed by the statute of limitations, 31–33.

statute of James not pleadable in, 31.

suits in, how limited by statute of 4 Anne (c. 16), 31.

statute of Anne not applicable in this country, 32.

no statute limiting suits in, in this country, 32.

State laws not binding in, 32.

but courts of, do not entertain suits on stale demands, and, like courts of equity, act in analogy to rules prescribed by courts of law, 33.

**ADVERSE POSSESSION,**

considered, 380–418.

as affecting boundaries, see **BOUNDARIES.**

the foundation upon which real and possessory actions are supported, 380.

of much importance in this country, 380.

is evidence of a fee, independently of statute, 1–5.

the rule, how construed, in controversies between States, 380.

private individuals in all cases barred by, under the statute of limitations, 381.

where neither party has title, the prior possession prevails, 381.

an entry, by the party who has the written title, may be dispossessed by an adverse possessor, 381.

may be set up to show the nullity of a conveyance by a person out of possession, 381, 418.

the effect of adverse possession the same in equity, 382, 390.

caution requisite in purchasers of land held adversely, 383.

presumption always in favor of legal owner, 384.

**ADVERSE POSSESSION, — continued.**

and possession may be permissive, 384.

possession, to be adverse, must denote *disseisin*. See **DISSEISIN**.

difficulty in defining, 390.

definition offered, 390.

proof of *intent* to claim against the true owner requisite, 390.

questions of, questions of law and fact, 390.

the jury are to find as to the *quo animo*, 390.

intent to hold adversely, and corporeal occupation, both requisite, 391.

what acts sufficient to show intent, 391.

occupation must be visible and notorious, and within defined boundaries, 392, 393.

continued residence not necessary, 392.

eaves-droppings on land of adjoining proprietor constitutes, 393.

as to acts showing an intent to claim new lands remote from settlements, 394.

by entry without color of title, limited to the actual occupancy, 394.

as possession is presumed to follow the ownership, 394.

possession must be strictly *possessio pedis*, 391, 395.

must be by substantial enclosure, 395.

what not a sufficient enclosure, 395.

cattle-ranging not sufficient possession, 396.

as to clearing and cultivating, 396.

occasional acts of dominion, 396.

payment of taxes alone, 397.

payment of taxes in connection with other acts, 397.

must be such acts as would give notice to the owner, and from which the jury could infer an acquiescence, 398.

possession must continue the same in point of locality, 399.

difference between possession taken by an intruder, and by one under color of title, 400.

possession of intruder limited by actual occupation, while that of one under color of title is coextensive with described boundaries, 400.

as to interference of surveys, 402.

the doctrine that possession of part, under color of title, is coextensive with the boundaries described in claimant's deed, how qualified, 403.

as to what is color of title, and fraudulent grants, 404—406.

of parol gifts, as constituting color of title, 407.

no color of title without some description of the land, 408.

color of title only, and without possession, not a *disseisin*, 409.

where there is a possession, at the same time, of more persons than one, 410.

grant under a foreign government does not afford color of title, 411.

neither do grants from the aboriginal natives, 412.

effect of possession when taken successively by different persons, 413, 414.

rights of persons in remainder and reversion, as affected by adverse possession, 415.

under the statute of 3 & 4 Will. IV. (c. 27), 417.

also under the Revised Statutes of New York, 416.

**ADVERSE POSSESSION, — continued.**

deeds, how inoperative against persons holding adversely, 418.

(See COTENANCY — LANDLORD AND TENANT — MORTGAGOR AND MORTGAGEE  
— TRUSTEE AND CESTUI QUE TRUST.)

**AGENCY AND FACTORAGE,**

whether action lies by principal against an agent or factor for not accounting till after a demand, 179–182.

how the statute is construed to apply in such cases, 179–182.

demand necessary where one copartner is made agent to collect debts after dissolution, 182.

the relation a fiduciary one, and the agent a trustee, 179, 182.

(And see TRUST.)

**AGENT,**

of acknowledgments and new promises by and to, 261, 262, 269.

**ASSUMPSIT,**

action of, see PLEADING.

when it came into use, 19.

how it originated, 70.

action of, within the statute, though not mentioned, 70, 193.

to what cases extended, 71–73.

(And see COVENANT.)

to torts *quasi ex contractu*, 72, 136–142.

may not be barred when action for tort on same demand may be, 72.

when assumpsit may be waived, and trover or trespass brought, see TRESPASS, TROVER.

the general rule in declarations in, 79.

the gist of, for violation of special contract, 137.

exception concerning merchants' accounts does not apply to, 153, 154.

**AWARD. See SPECIALTIES.****“BEYOND SEAS.” See DISABILITIES.****BONDS. See SPECIALTIES.**

proof of two breaches, in an action upon, statute runs from time of first breach, 140.

**BOUNDARIES,**

extent of adverse possession of land, as determined by a river, 392.

rights of adjoining proprietors, as affected by adverse possession, 384, 393.

of eavesdroppings over the true line, 393.

other cases of disputed boundaries, 400, 401, 415. .

**CASE,**

action of, see TORTS.

for criminal conversation, 309.

whether that, or action of trespass, be most proper, 309.

**CO-CONTRACTORS,**

acknowledgment of debt by one of several, 248–260.

is binding on all, and on what ground, 248.

whether the contract be joint or several, 249.

principal and surety, 249.



**CO-CONTRACTORS, — *continued.***

where the relation is collateral, acknowledgment by one of the parties liable not binding on another, 250.

severance of the community of interest by death and bankruptcy, 251–253.

whether representatives of deceased partner are bound by the keeping alive a debt by surviving partner, 255.

distinction between an acknowledgment by a sole debtor, and one by a co-contractor, 256.

the effect of an acknowledgment by one partner after dissolution considered, 257.

acknowledgment by one contractor under the Act of Geo. IV. (c. 14), 275.

under similar acts in this country, 281–284.

**COLOR OF TITLE. See ADVERSE POSSESSION.****CONSTITUTIONAL LAW. See NULLUM TEMPUS, &c.**

constitutionality of acts of limitation, 11.

**CONTRACT. See PROMISSORY NOTES AND BILLS OF EXCHANGE.**

obligation of contracts not impaired by statutes of limitation, 11.

when the statute commences running on certain miscellaneous simple contracts, namely, —

money payable by instalment, 110–112.

conditional promises, 113, 114.

liability depending on contingency, 115.

money paid by mistake, 116.

failure of consideration, 117–119.

continuation of services, 120.

postponement of right to sue, 121, 122.

money paid by one of several concerned, 123–127.

promises of indemnity, 128–130.

money paid by a surety, 131–135.

torts *quasi ex contractu*, 136–142.

violation of special contracts, 137.

**COPARCENERS,**

who are, 421.

in this country, treated as tenants in common, 421.

one may be disseised by another, 421.

(And see COTENANCY.)

**COTENANCY,**

adverse possession as between joint-tenants, tenants in common, and coparceners, 419–436.

actions as between, in New York, *note* to 421.

doctrine of adverse possession as between, in England, 422–428.

in this country, much the same, 429–436.

acts of ownership by one cotenant not necessarily a disseisin, 429.

though, in common cases, such acts would be, 429.

possession by one, *per se*, not a disseisin, 429.

the relation of cotenants like that of lessor and lessee, 429.

conveyance of one by the whole, and possession accordingly by grantee, a disseisin, 430.

so also a claim to the whole, and a refusal by one to admit the possession of others, 431.

**COTENANCY, — continued.**

as to presumption of ouster by the taking of the rents and profits by one exclusively, 432.

possession by one for a very long period a presumption of an actual ouster, 433.

the yielding up to one by a stranger, who is a disseisor, puts all in seisin and possession, 434.

acts done by one, in behalf of the estate, inure to the benefit of all, 435.

whether one may claim as cotenant, without admitting the fact of cotenancy, 436.

one cotenant under disability does not save the right of the others, 484.

**COURTS. See ADMIRALTY—EQUITY.**

federal, bound by the construction of the statute by the State courts, 24, 28.

**COVENANT,**

action of, see SPECIALTIES.

not within the statute, 77.

in what cases touching covenant assumpsit may be brought, 77.

**DEBT,**

action of, see SPECIALTIES, PLEADING.

formerly the ordinary remedy on simple contract, 19.

how connected with *wager of law*, 19.

when within the statute, 76.

declaration in, similar to declaration in assumpsit, and the difference, 76.

distinction between actions of debt upon contract, without specialty, and actions upon contracts in fact, 79, 80.

exception concerning "merchants' accounts" does not apply to, 154.

**DETINUE. See TORTS.****DEVISE,**

for payment of debts, not sufficient acknowledgment to revive a debt upon which the statute has operated, 232.

of *land*, for payment of debts, a direct trust, to which the statute does not apply, 169.

otherwise with a charge upon *personal* estate, 169.

**DISABILITIES,**

exception concerning, in actions *ex contractu*, 192.

must be specially pleaded, 292.

new construction attempted, in reference to action of assumpsit, 193.

no persons excepted unless expressly mentioned, 194, 476.

a person under disability may sue, 195.

plaintiff must show a continuing disability from the first, 196.

and the principle extended, so that one disability cannot be connected with another, 197, 477.

when coexisting disabilities exist in the same person, no obligation to sue till all are removed, 198, 481.

no distinction between voluntary and involuntary disabilities, 478.

no *merger* of one disability with another, 199.

meaning of the term "beyond seas," 200.

**DISABILITIES, — continued.**

“beyond seas” and “out of the State” analogous expressions, and have the same meaning, 200.

in Pennsylvania, means without the limits of the United States, 201.

as to the adoption of a State rule in this respect, contrary to that of the Federal judiciary, 202.

construction of “beyond seas” in reference to a branch bank of the United States, 202.

in reference to District of Columbia, 203.

“beyond seas” not confined to subjects occasionally going abroad, but extends to foreigners constantly resident abroad, 204.

exception extended to absence of defendant, 205.

where plaintiff and defendant are both “beyond seas,” 205.

the word “return,” as applied to an absent debtor, 206.

the return must be open and public, and not clandestine, 206.

as to obligation of defendant to show that the creditor had knowledge of his return, or having attachable property in the State upon which an attachment might be made, 207.

saving clause respecting, in relation to real property, 477.

extends to persons on whom the right first descends, 477.

and cumulative disabilities not allowed, 477, 482, 527.

the word “death,” in the statute, 480.

where several disabilities exist together, 481.

thirty years or more may be necessary, 481.

persons under disability, saved by intervention of particular estate, when otherwise, would be barred, 483.

one cotenant under disability does not save the right of the others, 484.

**DISSEISIN. See ADVERSE POSSESSION, OUSTER.**

ancient meaning of, 385.

modern meaning of, 386, 390, *note*.

as to a disseisin in fact, and a disseisin by election, 387.

no distinction between, and dispossession, 388.

**DOWER. See REAL ACTIONS.**

writ of, *unde nihil habet*, a real action, &c., 367.

not within the statutes of 32 Hen. VIII. and 21 James I., 367.

in this country, in what States not within the Statutes, 367.

the reason why not within the statute, 367.

by statute 3 & 4 Will. IV., limited to twenty years, 367.

in New York, abolished, and ejectment substituted, 367.

how in some other States, 367.

**EJECTMENT. See ENTRY (Writ of).**

action of, though not named in the statute, is barred when the right of entry is barred, 366, 369.

writ of entry substituted for, in Massachusetts and Maine. See ENTRY (Writ of).

history of, 368.

now the most common in this country for the recovery of land, 368.

proceedings in, simple, 368.

**EJECTMENT, — continued.**

possession, however long, no bar to, unless there be a right of entry, 370–374.

as in case of an estate tail, with remainder in fee, 370.

no persons in remainder affected by length of possession of another during the existence of the life-estate, 371.

not in case of a descent cast, 372.

same as to an estate for a term of years, 374.

where there are two rights of entry, one may be lost and the other retained, 375.

as to evidence of termination of life-estate, by the death of tenant for life, 376.

the rule of *seven* years' absence does not apply in such case as evidence of death, 376.

if the action be brought within twenty years, no actual entry need be proved, 377.

but must be, if not brought till after that period, 377.

and must be an actual entry on the land, 377.

how, where the land is in more than one county, 377.

the entry must be *animo demandi*, 378.

by whom the entry may be made, 379.

**ENTRY (RIGHT OF).** See **EJECTMENT**.

**ENTRY (WRIT OF).** See **REAL ACTIONS**.

writ of, in Massachusetts and Maine, 339.

as modified in those States, a good substitute for ejectment, 340, 365.

what the writ of entry is at common law, 362.

*sur abatement*, limited to fifty years by Stat. 32 Hen. VIII., 363.

*sur intrusion* to thirty or fifty years, 364.

the latter remedy may fail when ejectment will lie, 364.

**EQUITY.** See **PLEADING — PROCESS — TRUST**.

courts of, how governed by the statute of limitations, 25–30.

laches ever discountenanced, by courts of, 25.

statute of limitation binding in courts of, by its spirit and meaning, 26.

whether in analogy or obedience to, 26.

equitable title barred, where legal title would be, 26.

the statute applicable in courts of, though no equitable jurisdiction established, when the statute was made, 27.

equitable jurisdiction of the Federal courts in the several States, and their obligation to respect the local law, 28.

when courts of, will prevent the bar of the statute, 30.

**EXECUTORS AND ADMINISTRATORS.** See **TRUST**.

time does not run against claim of deceased debtor, until one is appointed, 55.

unless it began to run in the lifetime of the testator or intestate, 56.

special limitation of actions against, 170.

object of it, and how construed, 170.

effect of acknowledgments and new promises by, in their representative character, considered, 265–287.

acknowledgments, &c., made to, 268.

**FEME COVERT.** See **DISABILITIES — HUSBAND AND WIFE.**

when the statute does not run against a debt due her till husband's death.  
60.

**FINES,**

antiquity of, doctrine of, 6.

statute of, and analogy to prescription and limitation of actions, 6, 12.

**FOREIGN JUDGMENT.** See **SPECIALTIES.**

**FORMEDON.** See **REAL ACTIONS.**

action of, in the *descender*, 354.

*remainder*, 355.

*reverter*, 356.

generally, 357.

actions of, how limited by the Statutes 32 Hen. VIII. and 21 James I.,  
358, 359.

persons claiming an estate tail by descent barred of their formedon by neglect of preceding person entitled, 359, 360.

the word "fallen," in the Statute of 21 James I., as applicable to remainders and reversions, 361.

**FRAUD.** See **TRUST.**

statute runs in equity in favor of, only from its discovery, 30, 183, 470, 471.

whether the statute runs in a *court of law* from the commission of the fraud, or from its discovery, considered, 184-186.

must be specially pleaded, 292.

opportunity afforded of detection of fraud, same as actual knowledge of it, 187-191, 470, 471.

courts of equity not inclined to interfere, if a party slumber unreasonably after the means of detecting fraud, 190, 470, 471.

will open settled accounts in cases of apparent fraud, 188.

**HUSBAND AND WIFE.** See **DISABILITIES — FEME COVERT.**

as to acknowledgment by an agent, or co-contractor, of wife's debt incurred before marriage, 262.

acknowledgment by, of wife's debt *dum sola*, 262.

by husband alone, 262.

**INDENTURE.** See **LANDLORD AND TENANT — SPECIALTIES.**

**INSTALMENT.** See **CONTRACT.**

**JOINT TENANT,**

how seised, &c., 419.

adverse possession, as between, 419.

(And see **COTENANCY.**)

**JUDGMENT OF COURT.** See **SPECIALTIES.**

**JUDICIAL EXCEPTIONS TO THE STATUTE,**

not admissible, 485-488.

(And see **STATUTE.**)

**LAND,**

policy of regarding possession of, as evidence of title, 9.  
 allodial nature of possession of, in this country, 333, 338.  
 how the term "allodial" differs from "tenure," 333.  
 peculiar qualities of allodial land, 333.  
 as opposed to those of land held under the feudal law, 333, 334.  
 in England, now essentially allodial, 334.  
 abolition of feudal relation of lord and tenant, 334, 335.  
 for complete title to, right to possession and right to property in, requisite,  
 341.

**LANDLORD AND TENANT,**

of adverse possession by tenant, 437-446.  
 landlord like a reversioner, 437.  
 and tenant's possession not adverse, 437.  
 though no rent has been paid, 438.  
 acknowledgment, or proof of tenancy at will, saves landlord's right, 439,  
 440.  
 holding over after termination of lease, not adverse, unless, &c., 441,  
 446.  
 relation between attaches to tenant's representatives, 442.  
 as to the effect of disavowal by tenant of landlord's right to make the  
 former's possession adverse, 444.  
 as by attorning to a third person, 445.  
 no evidence of tenant's disavowal of title admissible which tends to fraud  
 and perjury, 446.  
 law of prescription in Louisiana, as applied to, 446, *note*.

**LEGACY. See SPECIALTY—TRUST.****LEX LOCI ET LEX FORI,**

considered, 64-67.  
 contracts are to have the same interpretation abroad that they have by the  
 law of the country where made, 64.  
 but remedies are to be pursued according to the law of the country where  
 instituted, 65.  
 hence the limitation of actions upon contract depends on the law of the  
 country where the action is brought, 65.  
 a distinction between statutes of limitation in this respect, 67.

**LIEN,**

lien on property may remain, though the action to enforce the contract is  
 barred, 73, 92, 173.  
 whether it be on real or personal property, 73, 92.

**LIMITATION OF ACTIONS. See STATUTE.**

synonymous with prescription, 1-11.  
 in respect to rights and titles, 3-6.  
     remedies, 7.  
     history of, 12-18.  
 by statute 32 Hen. VIII., and 21 James I., 14.  
     3 and 4 Will. IV., 15.  
 of personal actions, why delayed, 16-19.  
 statute of Anne, as to persons "beyond seas," 20.

**LIMITATION OF ACTIONS, — continued.**

acts of limitation in this country, their resemblance to the English acts,  
and all construed alike, 14, 21, 27.

constitutionality of, 22.

statute of, to be strictly construed, 23, 29.

construction of, by State courts, binding on United States courts, 24, 28.  
in equity, 25-30.

in admiralty, 31-33.

the State not barred by statute of, 37.

nor the United States, 39.

(And see NULLUM TEMPUS, &c.)

where there are no persons to sue, or to be sued, 54-63.

(And see EXECUTORS AND ADMINISTRATORS.)

upon contracts, what statute applies.

(See LEX LOCI ET LEX FORI.)

what actions and demands *ex contractu*, may be barred, 68-78.

specialties not barred, 79-94.

actions on promissory notes and bills of exchange, how and when barred,  
95-109.

on miscellaneous simple contracts, 110-135.

on torts *quasi ex contractu*, 136-142.

mutual accounts not barred, 143-151.

the exception as to merchants' accounts, 152-165.

of suits against trustees of personal property, 166-179.

in respect to agency and factorage, 179-182.

debts barred revived by acknowledgment, 208-234.

when and how by conditional and indefinite acknowledgments, 235-239.

how by part payment, 240-247.

and by one of several co-contractors, 248-260.

acknowledgments by and to agents, executors, &c., 261-269.

in writing, 270-284.

of pleading the statute in actions *ex contractu*, 285-297.

upon torts, 309, 310.

limitation of actions upon torts, 298-310.

of judicial process, 311-332.

real property and actions, 333-367.

ejectment, 368-379.

adverse possession, 380-418.

cotenancy, 419-436.

landlord and tenant, 437-446.

mortgagor and mortgagee, 447-467.

trustee and *cestui que trust*, 468-475.

disabilities, 192, 476 *et seq.*

**MALFEASANCE,**

assumpsit lies for damages resulting from, 71, 136, 141.

**MERCHANTS' ACCOUNTS,**

exception in the statute respecting, 70, 143, 152.



**MERCHANTS' ACCOUNTS, — continued.**

reason of the exception, 153.

must be specially pleaded, 292.

confined to accounts, in respect to which one party may have an action of *account*, 152.

does not apply to *assumpsit*, either for the several items of which the account is composed, or for the general balance, 152.

nor to an action of *debt*, 152.

whether or not they are barred of no item within six years (cases reviewed), 154 *et seq.*

though not barred, when payment may be presumed, 159.

they must be *current* accounts, *mutual* or *reciprocal*, 160.

as to what are strictly "merchants' accounts" within the meaning of the exception, 161, 162, 163.

**MISFEASANCE,**

*assumpsit* lies for damages resulting from, 71, 136 *et seq.*

**MONTH,**

the meaning of, in law, 51, *note*.

(And see **TIME**.)

**MORTGAGE,**

a promissory note secured by mortgage does not render it a specialty, 92.

(See **LIEN — SPECIALTY**.)

**MORTGAGOR AND MORTGAGEE,**

in respect to adverse possession, 447–467.

that tenant cannot dispute lessor's title applicable to, 447.

mortgagor in possession, tenant at will, 448, 449, 455.

when tenant at sufferance, 452.

when tenant for years, 452.

tenant at will only *quodam modo*, 448, 453.

possession of mortgagor not *prima facie* adverse, 449, 450.

certain propositions in respect to the relation of mortgagor and mortgagee, 453.

mortgagor's twenty years' possession evidence of presumed payment, 453, 454.

possession of mortgagee considered, 456, 467.

mortgagee trustee, while right of redemption exists, 456.

possession of, bars right of redemption, 456.

unless an account has been settled, 457.

or where the mortgage has been admitted, 458.

and as to the effect of verbal and *parol* admission, 459.

or where the mortgagor continues in possession, 462.

or where no time appointed for payment, 461.

or where there is fraud in mortgagee, 463.

as to redemption after twenty years by those claiming in remainder or reversion, 464, 465.

in what point of view mortgagee is trustee of mortgagor, 466.

possession of equity of redemption a bar to another person claiming the same equitable right, 467.

**MUTUAL ACCOUNTS,**

action of account applicable to, 69.

**MUTUAL ACCOUNTS, — *continued.***

equitable jurisdiction over, 69.

not barred if any item within six years, 143–148.

within the equity of the exception in respect to “merchants’ accounts,” 143.

items within six years equivalent to a new promise to pay those of longer standing, 144, 145.

doctrine denied in New Hampshire, and the only instance, 145.

no difference upon which side of the account the items within six years are, 147.

items cannot be proved by plaintiff’s suppletory oath, 147, *note*.

the accounts must be strictly mutual or reciprocal, 148.

are made up of matters of set-off, and constituted where a natural equity arises, that the items on one side shall be set off against those on the other side, 75, 79, 149.

what are and are not such matters of set-off, 149.

do not exist after they have become *stated* and a balance struck, 150.

balance when found may be an item in a new mutual account commenced, 151.

excluded by 9 Geo. IV. c. 14, unless in writing, &c., 358.

**NEW PROMISES AND ACKNOWLEDGMENTS. See AGENTS, CO-CONTRACTORS, EXECUTORS, HUSBAND AND WIFE, PART PAYMENT.**

debts barred revived by new promises, 208–234.

by a simple acknowledgment of their existence, 208.

such acknowledgment operates as an implied promise, and not as repelling a presumption of payment, 208.

by the earlier cases, no acknowledgment admissible, 209.

when acknowledgment made admissible, 210.

latitude allowed in admitting equivocal acknowledgments, and such as are not consistent with a promise, 210.

commencement and final establishment of, in England, of a more strict and consistent construction, 211.

a construction which excludes qualified and ambiguous words, and proceeds upon the principle of a new promise, and not upon that of repelling presumption of payment, 211.

such construction early maintained, and eventually generally recognized by the judicial tribunals in this country, 212–230.

review of decisions and judicial reasoning on the subject in Supreme Court of the United States, 212.

Pennsylvania, 213.

New York, 214.

Massachusetts, 215.

Maine, 216.

Connecticut, 217.

New Hampshire, 218.

Vermont, 219.

Virginia, 220.

Maryland, 221.

**NEW PROMISES AND ACKNOWLEDGMENTS, — *continued.***

review of decisions and judicial reasoning on the subject in Delaware, 222.

North Carolina, 223.

South Carolina, 224.

Kentucky, 225.

Tennessee, 226.

Illinois, 227.

Missouri, 228.

Alabama, 229.

*Bell v. Morrison* generally acknowledged as the leading authority, and the reasoning of the court in it adopted, 230.

the conclusions established by before-mentioned decisions, briefly stated, 231.

a devise for payment of debts, not sufficient acknowledgment to revive a debt of testator upon which the statute has operated, 232.

return of a debt in an insolvent's petition not a sufficient acknowledgment, 233.

subsequent acknowledgment of contract broken, *to do an act*, of no avail, 234.

an established distinction in respect to acknowledgment, between a promise to pay money and promise to do an act, 234.

conditional new promises and acknowledgments, 235–237.

of no avail unless condition complied with or event happening, 235–280.

extent of the binding effect of conditional new promises in particular cases, 236.

same rule governs a new conditional promise, though made before the six years expired, 237.

indefinite new promises and acknowledgments, 238, 239.

indefinite in respect to the particular debt, 238.

indefinite as to amount of demand acknowledged, 339.

in writing under the Act of 9 Geo. IV. c. 14, 270–284.

the object to prevent fraud and perjury, and not to change the legal construction as to the effect of a new promise, 271.

writing must be signed by the party, 272.

debtor must be personally chargeable, 273.

the act excludes mutual accounts unless in writing, 274.

policy of the act how far adopted in Virginia, 280.

in Massachusetts, Maine, Vermont, Michigan, 281.

**NON-FEASANCE,**

assumpsit lies for damages resulting from, 71, 136–142.

**NONSUIT. See PROCESS.****NULLUM TEMPUS OCCURRIT REGI,**

the maxim considered, and its application in this country, to both the State and United States governments, 34–41.

maxim extended in England to lessees of the crown, 38.

how far it extends to the agents of the State governments in this country, 38, 39.

to the transferees and agents of the United States, 40.

**NUISANCE. See TORTS.**

**OUSTER.** See **ADVERSE POSSESSION.**

sometimes used for disseisin, 389.  
 does not mean actual violence, 389.  
 meaning explained, 389.  
 by one cotenant to another, 424.

**PARTNERSHIP.** See **CO-CONTRACTORS.****PART PAYMENT,**

as an acknowledgment or new promise, 240-247.  
 payment of a smaller on account of a greater sum, evidence of a new promise, 240.  
 also giving security for part, 240.  
 or a negotiable note, 240.  
 also payment of interest, 240.  
 promise to pay when not inferred, 240.  
 credit given for interest, same as money paid, 240.  
 indorsements of payment must be *bona fide*, 241.  
 or with the privity of the debtor, 241.  
 what sufficient evidence of a *bona fide* indorsement, 242.  
 statement in the declaration of part payment by defendant, of no avail, 243.  
 oral admission of part payment, 244.  
 must appear that the payment was on account of the demand in suit, 244.  
 as to whom it may be made, 246.  
 delivery of goods in part payment, 247.  
 as to part payment under the Act of 9 Geo. IV. (c. 14), 275-289.  
 under similar acts in this country, 281-284.

**PAWN.** See **TRUST.****PLEADING,**

of pleading the statute in actions *ex contractu*, 285-297.  
 settled that statute must be pleaded, and why, 285.  
 the plea of *non accrevit*, &c., why preferable to the plea of *non assumpsit*, &c., 287.  
 in the case of a new promise or acknowledgment, the declaration is on the original promise, 288.  
 so if made to or by an executor, 289.  
 replication to plea of *non assumpsit*, &c., 290.  
 to *non accrevit*, &c., 291.  
 fraud must be specially replied to, 292.  
 so the exception of accounts between merchants, 292.  
 so the exception of persons under disabilities, 292.  
 plea of *nil debet* answers to *non assumpsit*, 293.  
*non accrevit*, &c., proper in action of debt, 293.  
 (And see **DEBT.**)  
 pleading the statute in equity, 394-397.  
 whether the bill may be demurred to, or whether statute must be pleaded, 394, 395.

**PLEADING, — *continued.***

- in cases where fraud is charged in the bill, 396.
- pleading the statute in actions upon torts, 309, 310.
- (And see TORTS.)

**POSSESSION. See PRESCRIPTION — LAND.**

- as in general evidence of title, 3-10.
- (And see ADVERSE POSSESSION.)

**PRESCRIPTION,**

- defined as synonymous with limitation of actions, 1.
- of two kinds, 2.
- as applied to rights and titles, 1-6.
- to remedies, 7.
- history of, 8, 9.
- founded on public policy, 9.
- on private justice, 10.
- as applied to corporeal and incorporeal hereditaments, 4.
- its analogy to statutes of possession, 4, 5.
- importance of, as to land titles, 9.
- under the Jewish law, 8.
- Grecian, 8.
- Roman, 8.
- Modern continental, 8.
- Scotland, 8.
- Hindoo, 8, *note.*
- of title to land, 3-6.
- principle and importance of, 3-6, 11.
- presumption of payment, 11, 78, 159, 171, 172.

**PROCESS,**

- judicial, considered, 311-332.
- what is the commencement of, in England, 311.
- in this country, the suing out of the writ, 312.
- and not the service, if the *bona fide* intention be to have the writ served, 312.
- where the writ is forwarded by mail to the officer, 312.
- where the writ is directed to the sheriff of a county in which defendant does not reside, 314.
- date of writ not conclusive as to the time when taken out, 315.
- filing of a claim in set-off equivalent to the commencement of an action, 316.
- where writ issues against two and served only upon one, 317.
- continuances, rule as to, in England, 318.
- and in this country, 318-321.
- when judgment is reversed, how and when a new action may be commenced, 323.
- cases included by construction within the provision of the statute respecting reversal of judgment, 324.
- new action may be commenced in case of abatement of suit, by the death of one of the parties, 325.
- no exception to the running of the statute in case of a voluntary abandonment of an action, 327.

**PROCESS, — continued.**

as in case of abatement of suit by marriage of *feme sole*, 327.

in case of *nonsuit*, no new action can be commenced after six years expired, 328.

the effect of a written chancery as to preserving the right to an action at law, 329.

what is the commencement of a suit in equity, 330.

effect of bill filed by one creditor in behalf of himself and others, 331.

a proceeding at law does not, in case of nonsuit, preserve the right to one in equity, after six years, 332.

**PROMISSORY NOTES AND BILLS OF EXCHANGE,**

though a note be secured by a mortgage, it remains still a simple contract, 73, 92.

of the currency of the statute upon, 95–109.

statute runs from the time of the falling due of a note, against the payment by an accommodation indorser, 100.

where goods are sold on a term of credit, and payment to be then made by a bill, 101.

statute runs on a note, though the maker assign his property to creditors, 102.

where a note is not to be delivered to payee, before the performance of a condition, 103.

effect of an agreement between maker and payee, 104.

bill or note for money before lent, 105.

notes sold before due, under misrepresentation of payee, 106.

law as to the limitation of notes *witnessed* in Massachusetts, 107.  
in Maine, 108.

(And see **USURY.**)

suits against notaries, for neglect in charging indorsers, 138.

against attorneys for neglect in collecting, 139.

statute runs from date when on demand, 95.

though payable with interest, 95.

or if not, to draw interest during the life of the promisor, 95.

no term of grace allowed on notes on demand, 95.

a receipt for money like a note on demand, 95.

notes payable after demand, demand is necessary, and the time runs only from a demand, 96.

but demand must be made within a reasonable time, and what is, 96.

on notes and bills, “after sight,” or “after notice,” statute runs from presentment and notice, 97.

but presentment and notice must be in a reasonable time, and what is, 97.

difference between a bill or note “after *date*” and “after *sight*,” 97.

statute runs from time of refusal of acceptance and notice, 97.

payable at a particular place, presentment must be made at that place, 98.

statute runs from the last day of grace, 99.

the time of payment by an accommodation acceptor, 100.

- REAL ACTIONS.** See **DOWER, ENTRY, FORMEDON, WRIT OF RIGHT.**  
 still retained in this country, though abolished in England, 333-339.  
 in disuse in England before abolished, 334.  
 abolition of, by Statute of 3 and 4 Will. IV. c. 27, 336.  
 writs of dower and *quare impedit* only retained, 336.  
 reasons assigned for abolition of real actions in England, 337.  
 in what States abolished in this country, 339.  
 not much resorted to where in force, 339.  
 in force in the States which were colonies, unless expressly abolished, 339.  
 but mode of proceeding in, simplified, 340.  
 are designated and limited in reference to the interest claimed, 341.  
 distinction between *droitural* and *ancestral droitural*, 341.  
 and between possessory and *ancestral* possessory, 341.  
 how limited before the Statute 32 Hen. VIII., and how by that statute, 342.  
 how by Statute of James I., 342.  
 law of limitation of, as established in England before the Statute of 3 and 4 Will. IV., 342.
- REAL PROPERTY.** See **LAND.**  
 considered in connection with real actions, 333-337.
- REPLEVIN.** See **TORTS.**

**SEISIN,**

- the meaning of, 386.
- Coke's quaint explanation of, *ib.* note.

**SET-OFF.** See **MUTUAL ACCOUNTS.**

- a demand barred cannot be set off, 74, 75.
- unless in cases of mutual accounts, 75, 144.
- filing of a claim in set-off equivalent to the commencement of an action to save the statute, 316.

**SLANDER.** See **TORTS.**

**SPECIALTIES,**

- are not within the statute, 79-94.
- as if the liability is created by the requisition of a statute, 80.
- distinction between liability imposed by statute, and having relation to it, 81.
- statute not pleadable to judgments of courts, 82.
- as to a judgment in a justice's court, 85.
- and to courts not of record, 85.
- statute applies to foreign judgments, 83.
- cannot be pleaded to an award under seal, 86.
- or if the submission be under seal, 86.
- nor in debt on an indenture reserving rent, 87.
- nor to bonds, 88.
- but payment of, presumed, 93.
- one co-obligor paying may sue the other in *assumpsit*, and may be barred accordingly, 89.
- statute does not apply to legacies, 90.



**SPECIALTIES, — continued.**

promissory note, though secured by mortgage, not a specialty, 73, 92.

warrant of attorney to confess judgment not a specialty, 91.

specialties limited by statute 3 and 4 Will. IV., to twenty years, 94.

**STATE.** See **COURTS — NULLUM TEMPUS, &c.**

**STATUTE.** See **LIMITATION OF ACTIONS.**

of limitations, is construed strictly, 23, 29, 485.

construction of English acts of limitation, how applicable in this country, 14, 21, 27.

Federal courts bound by the construction of the statute by State courts, 24, 28.

construction of statute of limitations as to the action of assumpsit, 70.

liability created by a statute, not within the statute of limitations, 82.

(See **SPECIALTIES.**)

origin, &c., of late statute of 3 and 4 Will. IV., 15.

**SURETY,**

when cause of action arises in behalf of a surety, 89, 131 *et seq.*

**TENANTS IN COMMON,**

nature of their title and possession, 420.

one may be disseised by another, 421.

(And see **COTENANCY.**)

**TIME.** See **MONTH — NULLUM TEMPUS, &c.**

its effect upon land titles and personal demands, 1–11.

how computed in construing the statute, 42–53.

same in law and equity, 42.

whether the day on which the right of entry or cause of action accrues is to be included or excluded, 43, 50.

the earlier cases on the subject, 43–45.

later and different decisions, 46, 50.

when months are mentioned in a statute, whether is meant lunar or calendar, 51.

when a thing is ordered by a particular day, that day excluded, 52.

meaning of *instantly*, 53.

time does not run when there is no person to sue, 54–61.

or a person to be sued, 62, 63.

or when a person is restrained from suing by a law, 63.

**TORTS,**

assumpsit lies for torts *quasi ex contractu*, and how and when barred, 71, 72, 136–142, 299.

limitation of actions upon, 298–310.

for private nuisance, 300.

slander, 301–303.

trover, 304.

replevin, 305.

detinue, 306.

trespass, 307.

criminal conversation, 308.

pleading the statute in actions upon, 309, 310.

**TRESPASS.** See **TORTS.**

action of, may be barred, when assumpsit on same demand will not be, 72.

whether action of, or action on the case, be the proper action for criminal conversation, 308.

**TROVER.** See **TORTS.**

action of, may be barred, when assumpsit on same demand will not be, 72.

**TRUST.** See **AGENCY AND FACTORAGE.**

direct trusts are not barred, and the principle of the rule, 166, 468.

instances of direct trusts which are not reached by the statute, 167, 468.

common mode of creating, by the appointment of executors and administrators, 168.

retention of funds by them consistent with their character, 168.

may therefore be held to answer after a long period, 168.

devise of land to trustees or executors is a direct trust, and the statute does not run after testator's death, 169, 468.

otherwise with a charge upon personal estate, 169.

where executors, &c., may be sued at law, and a limitation fixed for actions against them, the above equitable doctrines do not apply, 170.

statute does not apply in some cases to matters of account, 171.

but a presumption of settlement may arise short of twenty years, 171.

so where legatees become trustees for the creditors on account of deficiency of assets to pay all the debts, 172.

presumption of payment of unpaid legacies from long forbearance, 172.

statute does not run against property held in pawn, 173.

but right of redemption may be lost by lapse of time, 173.

direct trusts liable to be barred by the statute when an adverse claim set up by trustee, 174-178, 472.

trusts cognizable at law, not withdrawn from the operation of the statute, such as implied and constructive trusts, 178, 469-471.

acts of trustee as would, if done by one cotenant of land, be an ouster of the others, constitute adverse possession, 472.

or such acts as if done by a tenant, would be an ouster of the landlord, 472.

rule, that the possession of trustee in common cases is not adverse, cannot be extended to the possession of a third person, 473.

in what point of view a mortgagee is a trustee of mortgagor, 452-465.

possession of *cestui que trust* not adverse, unless, &c., 474, 475.

**UNITED STATES.** See **COURTS — NULLUM TEMPUS.****USURY,**

to entitle a person to a moiety for the penalty of usury, prosecution must be within the time prescribed for the commencement of process, 109.

**WAGER OF LAW,**

supplied the want of limitation of actions on contract, 19.

**WARRANT OF ATTORNEY.** See SPECIALTIES.

**WRIT OF RIGHT.** See REAL ACTIONS.

or *droitural*, the highest writ in the law, and lies in what cases, &c., 343–349.

lies concurrently with other actions, 343.

and after other remedies lost, 343.

judgment in, final, 343.

of the *mise* in, 343.

in England, actual seisin necessary to maintain, 344.

so in Kentucky, 345.

but in this country generally, not so, 345.

where demandant relies on the seisin of ancestor, 346.

tenant in, may give evidence of title in third person, 347.

demandant in, may recover according to his interest proved, 348.

as to the admissibility of two counts in, for the same land, 349.

different limitations of, between possession against the ancestor and against the demandant himself, 350.

distinction between ancestor and predecessor, 351.

incongruity and injustice of the limitation of, 352.











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